Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

MARIE E. WIRSING,

Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO, and each of its members, KATHLEEN ARNOLD, RICHARD BERNICK, ROBERT CALDWELL, PETER DIETZE, LYNN ELLINS, HARVEY PHELPS, NORWOOD ROBB, ROY SHORE, and DAVID WINN; WILLIAM GRADY, DEAN OF THE SCHOOL OF EDUCATION, UNIVERSITY OF COLORADO AT DENVER; JOHN BUECHNER, CHANCELLOR OF THE UNIVERSITY OF COLORADO AT DENVER; and E. GORDON GEE, PRESIDENT OF THE UNIVERSITY OF COLORADO,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a state university professor protected by the First Amendment for refusal to engage in a mandatory classroom exercise when

(a) the exercise is contrary to the professor's published scholarship and research,

(b) the exercise is contrary to the published standards of the professor's discipline, and

(c) the refusal is sanctioned by the academic freedom statement of the university?

2. Does a state university policy mandating student evaluation of faculty and courses by a standardized instrument which emphasizes only one teaching ideology, cast a pall of orthodoxy over the classroom in violation of the First Amendment, where it is shown that merit pay increases for faculty are directly related to the results of student evaluation?

PARTIES TO THE PROCEEDING

The parties to this proceeding consist solely of the parties listed in the caption.

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LOWER COURT OPINIONS

The opinion of the United States District Court for the District of Colorado is published at *Wirsing v. Bd. of Regents*, 739 F.Supp. 551 (D.C.Colo 1990). (App. *infra* A3-A10). The order of the United States Court of Appeals for the Tenth Circuit was issued without opinion, and is not published. (App. *infra* A1-A2).

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on October 4, 1991. The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

AMENDMENT I.

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Professor Marie Wirsing, brought suit against the Board of Regents of the University of Colorado, and certain university officials, challenging a regulation of the regents as unconstitutional on its face and as applied because the regulation interferes with Professor Wirsing's academic freedom. Jurisdiction in the District Court was based on 28 U.S.C. § 1331 and the First and Fourteenth Amendments to the United States Constitution.

Professor Wirsing, is a tenured Professor of Education at the University of Colorado at Denver ("the university"). Her academic discipline is Foundations of Education, which, as the name suggests, is the study of the relationship between teaching and the underlying factors, philosophical and historical, which influence classroom teaching methods. Professor Wirsing is a nationally recognized academician in her field.

Professor Wirsing has consistently been evaluated by her students, her colleagues, and her supervisors as a superior teacher. The university has a merit pay policy to reward and foster such quality teaching. However, even recognizing Professor Wirsing as an outstanding teacher, the university has denied her merit pay increases since 1987 solely because she refuses to participate in an

administrative classroom activity which is contrary to her own published scholarship and contrary to the published standards of her academic discipline.

The classroom activity at issue is administration of a standardized form for student evaluation of faculty and courses. In 1986, the regents of the university adopted an administrative policy which mandates that all faculty devote class time and assist in the administration of a standardized student evaluation form. (App. *infra* A22-24). The form itself reflects a positivist-realist philosophy, and measures characteristics usually present in teachers with positivist-realist beliefs. (App. *infra* A37, ¶ 6).[1] Instructors are required to bring the standardized

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[1] The positivist-realist ideology underlying the form mandated by the regents is a fact which must be accepted as true because the case was decided against Professor Wirsing on summary judgment. However, this fact may be verified by reference to education foundation textbooks which invariably introduce the student to a variety of diverse education philosophies. *Social Foundations of Education*, authored by VanScotter, Haas, Kraft, and Schott is an introductory text. R. VanScotter, J. Haas, R. Kraft, J. Schott, *Social Foundations of Education* (3d ed. 1991) [hereinafter cited as VanScotter]. In Chapter 3, "Philosophies of Education," the authors describe five different philosophies of education and how they relate to traditional life philosophies of idealism, realism, and pragmatism. *Id.* at 71. Central to a realist point of view is the notion that measurable quantity and quality are features of every existing thing. *Id.* at 70.

Similarly, Myers and Myers in *An Introduction to Teaching and Schools* consider in greater detail 12 different philosophies. C. Myers, L. Myers, *An Introduction to Teaching and Schools* 282-324 (1990) [hereinafter cited as Myers]. Again, objective evaluative thinking is recognized as central to what the

(Continued on following page)

forms to class sometime between the 13th and 15th weeks of each 16-week term, and select a student proctor to distribute and collect the forms. (App. *infra* A26). Instructors are advised that the questionnaire "should normally be administered at the beginning of class." (App. *infra* A26). The instructor is required to leave the classroom while students complete the evaluation forms. (App. *infra* A57).

The regents' policy mandates that a standardized form be used to evaluate all faculty members and courses at each campus. (App. *infra* A22). The purpose of the policy is to accumulate comparative data and the data is used in determining merit pay. (App. *infra* A41, ¶ 5).

(Continued from previous page)

authors identify as the "classical realist" approach. *Id.* at 297-300. In contrast, objective evaluation has no part in an existentialist philosophy. *Id.* at 305-08.

Positivism is another philosophy that shares certain characteristics with realism, most notably belief in the objectification and measurability of all important human activity, and the organization of knowledge into discrete empirically-verifiable parts. *See Modern Philosophies and Education* 304-341 (Henry ed. 1955). Because of the significant shared assumptions of the two philosophies, they are identified in this document, as in the published scholarship of Professor Wirsing, as positivism-realism.

The very notion that learning and teaching are activities capable of quantified, objective evaluation, and against discrete criteria, is inherently a positivist-realist view. That is precisely why an objective evaluation form, such as the one adopted by the University of Colorado regents, is not a neutral instrument but in fact conveys a positivist-realist philosophy.

Professor Wirsing does not object to student evaluation of faculty and does not object to using student evaluations in determining merit pay. She does object to the use of a ***standardized*** form and has refused to administer the standardized form to her classes.

Professor Wirsing's objection is grounded not only in her own published scholarship[2] but also in the published standards of her discipline. Both reflect agreement among scholars of educational foundations that there is no single set of criteria regarding what constitutes good teaching, and the historical evidence does not support any particular set of good teaching characteristics. *See generally Modern Philosophies and Education, supra* n. 1; H. Broudy and J. Palmer, *Exemplars of Teaching Method* (1965); and *Masters: Portraits of Great Teachers* (Epstein ed. 1981). In her 1972 book, *Teaching and Philosophy: A Synthesis, supra* n. 2, Professor Wirsing explains various teaching philosophies and how teaching characteristics vary based on the

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[2] *See* Marie E. Wirsing, *Teaching and Philosophy: A Synthesis*, (1972); Wirsing, *A Sense of Courage*, Proc. S. Atl. Phil. Educ. Soc'y, Fall 1978, *reprinted in* Educ. Stud., Summer 1978, at 147-161; Wirsing, *A Sense of Direction*, Educ. Stud., Spring 1981, at 49-67; Wirsing, *Educational Competence and Wire Cages*, Educ. F., Fall 1982, at 9-23, *reprinted in* Educ. Dig., January 1983, at 16-19; Wirsing, *The New Civic Religion*, Tchr. Educ. Q., Spring 1984, at 60-72, *reprinted in The CASA Handbook*, 138-148 (1984); Wirsing, *Holmes and Carnegie, The Myth of Bold New Reform*, Tchr. Educ. Q., Winter 1987, at 40-51; Wirsing, *The Centralization of Academic Authority*, Educ. Found., Spring 1987, at 87-106; Wirsing, *The State Decides the Truth*, The Denver Post, July 5, 1988, at 7B, col. 4.

teacher's philosophical approach.[3] Chapter 7, "The Achilles Heel of Teaching: Evaluation," is a discussion of how philosophy affects the teacher's evaluation of students. *Id.* at 155-173. In her later writings, Professor Wirsing explains that the same philosophic factors which bear on evaluation of student performance are essential to evaluating teacher performance. *See* Wirsing, *Holmes and Carnegie, The Myth of Bold New Reform, supra* n. 2; Wirsing, *The Centralization of Academic Authority, supra* n. 2. The starting point for any evaluation of learning or teaching must be the teacher's own philosophic approach because achievement cannot be assessed without first knowing the goal to be achieved. *See* Wirsing, *Teaching and Philosophy: A Synthesis, supra* n. 2, at 135-154; J. Millman and L. Darling-Hammond, *The New Handbook of Teacher Evaluation* 211 (1990); *see generally Modern Philosophies and Education, supra* n. 1. To impose a single method of evaluation

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[3] Professor Wirsing's book describes many of the same philosophies considered in the textbooks cited previously in note 1. While there is considerable debate among those who ascribe to the various philosophies about how best to teach, there is agreement that a wide variety of valid teaching theories and methods exist.

The Myers text also tracks the development of classroom methods from the teacher's basic philosophic views about what learning is and how it is best accomplished. Myers, *supra* n. 1, at 282-398. It is axiomatic that teachers who employ different methods and have different goals will have different characteristics. Thus, the inadequacy of any standardized evaluation form which consists of a discrete list of 15-20 teaching characteristics is that the set of characteristics to be assessed is not the same from one teacher to the next. In short, standardized instructional criteria are intellectually and pedagogically invalid.

is to ignore the philosophic factors which influence classroom methods and thereby impose a single philosophic approach.

A standardized approach to evaluation is also contrary to the published standards of Professor Wirsing's academic discipline. The *Standards for Academic and Professional Instruction in Foundations of Education,* developed by the Council of Learned Societies in Education on behalf of seven national education organizations,[4] emphasize that "the imposition of any single intellectual outlook and associated behavior raises grave questions relative to education in a democratic society" and that foundational study programs are particularly undermined by a singular approach to assessment because the basic rationale of foundational programs is "the free and open inquiry into ***all*** normative issues; the unfettered questioning of what is and what ought to be." (App. *infra* A28-31).

Professor Wirsing has refused to administer the regents' standardized evaluation form to her classes for an even more practical reason. She specifically teaches in her classes that learning and teaching cannot be evaluated by any standardized approach. Because evaluation is a significant aspect of her foundations courses, the student evaluation exercise also serves as an instructional

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[4] American Educational Studies Association, Comparative and International Education Society, History of Education Society, John Dewey Society, Philosophy of Education Society, Society for Educational Reconstruction, Society of Professors of Education. (App. *infra* A28).

opportunity. For Professor Wirsing, who teaches by precept and example,[5] use of a standardized evaluation form converts this educational opportunity into a negative lesson, made more powerful by actual experience. Although she has never been inhibited from criticizing the regents' standardized form, and in theory, could use it as an example of what not to do, Professor Wirsing nevertheless objects to being compelled to tell her students "Do as I say, not as I do."

To emphasize that it is a standardized evaluation instrument, not evaluation itself, which is objectionable, Professor Wirsing has provided for her students to anonymously evaluate her teaching and her courses by an evaluation form consistent with her own philosophic approach to teaching, and has made these evaluations available for use in evaluating her overall performance. (App. *infra* A36-37, ¶ 5; A44-45, ¶¶ 3,6,7; A49, ¶ 3).

Each year since the regents adopted their policy requiring the use of a standardized instrument for student evaluation of faculty, Professor Wirsing has been evaluated as a superior teacher by the faculty evaluation process in use at the university. (App. *infra* A49, ¶ 4; A44-45, ¶ 4). Like all of the university faculty, Professor Wirsing's student evaluations are a significant factor in

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[5] The notion that students learn from the teacher's example is well recognized, even by this Court. In *Wieman v. Updegraff*, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed.2d 216 (1952), Justice Frankfurter observed that "teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry." 344 U.S. at 196, 73 S.Ct. at 221 (Frankfurter, J., Douglas, J. concurring).

her overall evaluation. (App. *infra* A49, ¶ 3; A45, ¶¶ 6,7). Each year, university administrators have reduced these superior teaching ratings to the lowest possible rating, ***solely because of Professor Wirsing's refusal to participate in administration of the standardized student evaluation form.*** Since the inception of the lawsuit, the university has admitted this fact. (App. *infra* A18, ¶ 14). As a result, Professor Wirsing has been denied merit pay increases which her superior ratings would have generated.

Professor Wirsing filed this suit in 1990, claiming that the regents' policy is unconstitutional on its face, and as it has been enforced against her. (App. *infra* A11-15). On cross motions for summary judgment, the regents postulated that the policy does not interfere with Professor Wirsing's academic freedom because neither the standardized form nor her required participation in its administration communicates any idea whatsoever, and moreover Professor Wirsing is free to criticize both the policy and the standardized form, and free to utilize her own evaluation form in addition to the standardized form. The regents asserted that the policy is a reasonable administrative rule, and that Professor Wirsing's refusal to comply is not expressive conduct protected by the First Amendment, but is merely insubordination for which she may be lawfully punished. The regents also claimed that the policy is a proper exercise of the university's own academic freedom, and urged the trial court not to interfere with the day-to-day operation of the university.

Professor Wirsing argues that because the form required by the regents' mandate favors a particular teaching ideology, a pall of orthodoxy is cast over the

classroom by coercing faculty to adopt the favored ideology. In her own case, Professor Wirsing claimed that the policy interferes with her academic freedom by dictating her classroom participation in an activity directly contrary to her teaching and further, that her required participation constitutes compelled speech because her conduct would tacitly communicate her approval of a standardized approach to faculty evaluation. Moreover, her refusal to administer the form is expressive of Professor Wirsing's view against standardized evaluation, and is therefore expressive conduct protected by the First Amendment.

The trial court held that although the First Amendment protects Professor Wirsing's right to disagree with the regents' policy, she is not free to express her disagreement by refusing to comply with the regulation. (App. *infra* A7). The court further held that Professor Wirsing's participation in administration of the standardized form, by bringing the forms to class, providing pencils, selecting a student proctor, and leaving the room while students complete the forms, is not conduct which communicates her approval of the process to her students. Indeed, the court held that the required conduct does not communicate any idea whatsoever. (App. *infra* A8). The court held that although the standardized form required by the regents is contrary to what Professor Wirsing teaches, the forms are not expressive of a content-based regulation. The court reasoned that the forms are unrelated to course content and therefore do not interfere with Professor Wirsing's academic freedom. (App. *infra* A8-9). Finally, the court upheld the regulation as it has been enforced against Professor Wirsing, based

on its holding that compelling use of the standardized form for teacher evaluation is part of the university's own right to academic freedom. (App. *infra* A9).

On appeal, the United States Court of Appeals for the Tenth Circuit summarily affirmed the trial court. (App. *infra* A1-2).

SUMMARY OF ARGUMENT

The Court should grant Professor Wirsing's Petition for Writ of Certiorari because the case sharply implicates important questions regarding academic freedom, which are unresolved by this Court's previous academic freedom cases. Specifically, the case squarely presents the conflict this Court recognized in *Univ. of Pennsylvania v. EEOC*, 493 U.S. 182, 110 S.Ct. 577, 107 L.Ed.2d 571 (1990) between the university as regulator and the university as speaker. Because the regents have asserted that the university's academic freedom rights protect regulatory acts of the regents and administrators, the case raises important issues as to the scope of such rights, who may exercise the university's academic freedom rights, the analysis to be applied when there is a conflict between the academic freedom rights of the university and the individual teacher, and whether the university's academic freedom may be exercised in a way that casts a pall of orthodoxy over the classroom.

The Court should also grant the Petition for Writ of Certiorari because the lower court's holding that Professor Wirsing's First Amendment rights are not violated by the regents' policy as it has been applied to her, is

contrary to United States Supreme Court precedent. Under *Keyishian v. Bd. of Regents of the Univ. of the State of New York*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967) and *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), Professor Wirsing's refusal to administer the standardized evaluation form is expressive conduct protected by the First Amendment. The lower court's contrary holding is error. Because the court failed to recognize the regents' mandate as a regulation of expression, it did not apply the less-restrictive-means test required under *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); *N.A.A.C.P. v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984); *U.S. v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

ARGUMENT

I. THIS CASE SHARPLY IMPLICATES UNRESOLVED QUESTIONS REGARDING ACADEMIC FREEDOM.

This Court has recognized academic freedom as a "special concern" of the First Amendment which will not tolerate government regulation that casts a pall of orthodoxy over the classroom. *Keyishian v. Bd. of Regents of the Univ. of the State of New York*, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967). Academic freedom protections are necessary to preserve American classrooms as a "marketplace of ideas," where our Nation's youth are

trained through "wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' " *Keyishian*, 385 U.S. at 603 (*quoting United States v. Associated Press, D.C.*, 52 F.Supp. 362, 372 (D.C.N.Y. 1943)).

As ascribed to teachers, academic freedom is a personal, individual right. *Sweezy v. State of New Hampshire*, 354 U.S. 234, 250, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957) ("We believe that there unquestionably was an invasion of [the teacher's] liberties in the areas of academic freedom and political expression – areas in which government should be extremely reticent to tread. . . . Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding."); *Keyishian*, 385 U.S. at 603 ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and *not merely to the teachers* concerned."); *Wieman v. Updegraff*, 344 U.S. 183, 196, 73 S.Ct. 215, 97 L.Ed.2d 216 (1952) ("[Teachers] must be free to sift evanescent doctrine, qualified by time and circumstance, from that restless, enduring process of extending the bounds of understanding and wisdom, to assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government.") (Frankfurter, J., Douglas, J., concurring).

Academic freedom extends not only to the teacher as an individual, but also to the university. The essential freedoms of the university are "***to determine for itself on academic grounds*** who may teach, what may be taught, how it shall be taught, and who may be admitted to

study." *Sweezy*, 354 U.S. at 263, 77 S.Ct. at 1218 (emphasis added). On its face, however, the university's academic freedom is not the right of its governing trustees but rather the academy as a whole, faculty, administrators, and even students.[6]

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[6] It is important to distinguish the concept of an institution's administrative autonomy, at issue in the instant case, from the concept of academic freedom as it historically has been developed and refined.

In the American setting, an individual scholar's academic freedom and an institution's administrative autonomy are related but essentially different concepts. Since both concepts have a common origin in the medieval university, it is easy to confuse one with the other. When rightly invoked, institutional autonomy has been thought of as a necessary, but ancillary, protection for a faculty's academic freedom. *See generally* R. Hofstadter and W. Metzger, *The Development of Academic Freedom in the United States* (1955); J. Brubacher and W. Rudy, *Higher Education in Transition – A History of American Colleges and Universities 1636-1976*, 308-329 (3d ed. 1976). Arthur DeBardeleben, a regent of the University of Wisconsin, has observed, "[A] governing board has the responsibility of safeguarding and fostering an environment and an atmosphere unqualifiedly conducive to the free and untrammeled search for truth. It is the duty of a governing board to resist the pressures, clamors and demands of ideological groups and other special interests – all who would compromise the goals of scholarship – whether alumni, politicians, private donors, the press, or segments of the public. A governing board should protect the faculty and the students against all outside pressures which would divert them from scholarly pursuits." DeBardeleben, *The University's External Constituency*, in W. Metzger, S. Kadish, A. DeBardeleben, E. Bloustein, *Dimensions of Academic Freedom* 84 (1969).

The freedom sought by American academics was not a collective freedom of the institution from external control, but

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Professor Wirsing's case presents three questions which have not previously been decided by this Court: 1) Whether the university's academic freedom rights run to the university administration or to "the academy," including students, faculty, and administrators? 2) Whether the administration of a state university may exercise its regulatory authority under a claim of academic freedom, in a way that interferes with the teacher's

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an individual scholar's freedom from the institution's legally constituted governing authority. The American theory of academic freedom – clearly applying to academics and *not* to governing boards and administrative officials – was crystallized in the American Association of University Professors' seminal 1915 *General Declaration of Principles, reprinted in Academic Freedom and Tenure* 155-176 (Joughin ed. 1967), and in Arthur Lovejoy's authoritative definition of academic freedom. 1 *Encyclopedia of the Social Sciences* 387 (E. Seligman, A. Johnson eds. 1930). In brief, American universities and their scholars came to share authority: the university directing the administrative and procedural aspects of education and the scholar exercising authority in academic and pedagogical matters. *See* Lipschutz, *Academic Freedom: The Faculty's Special Responsibility,* Lib. Educ., Winter 1985, at 283-287.

Particularly relevant to this case, Kenneth Strike has pointed out that administrators abrogate their intellectual neutrality and use their authority unjustifiably by imposing assessments of proper teaching on academics: "Neutrality precludes justification of power that assumes that one view of what is good is inherently to be preferred to another." Strike, *The Legal and Moral Responsibility of Teachers* in *The Moral Dimensions of Teaching* 199 (1990); *see also* Strike, *The Ethics of Educational Evaluation* in *The New Handbook of Teacher Evaluation* 356-373 (J. Millman, L. Darling-Hammond eds. 1990).

personal academic freedom? 3) Whether the administration may exercise the university's academic freedom in a way that coerces faculty to adopt a particular ideology, and thus casts a pall of orthodoxy over the classroom?

A. Whether the university's academic freedom rights run to the university administration or to "the academy," including students, faculty, and administrators?

This Court recently observed in *Univ. of Pennsylvania v. EEOC*, 413 U.S. 182, 110 S.Ct. 577, 107 L.Ed.2d 571 (1990) that academic freedom issues become more complicated in public educational institutions because the government is both regulator and speaker. *Id.* 107 L.Ed.2d at 587, n. 6. This case squarely presents the very conflict noted in *Univ. of Pennsylvania* between the academic freedom rights of the university acting as an academy, and the university administration acting in its regulatory capacity.

Acting as an academy, for purely academic purposes, the University of Colorado adopted an expansive statement of academic freedom. (App. *infra* A32-34). The university defined academic freedom as "the freedom to inquire, discover, publish, and teach truth as the faculty member sees it, subject to no control nor authority save the control and authority of the rational methods by which truth is established." (App. *infra* A32). Consistent with the rights attendant to this broad concept of academic freedom, faculty members are charged with responsibility for acting in accordance with the highest

standards of their profession. (App. *infra* A33). Accordingly, they are assured evaluation will be based only on the merits of their work, and will not be influenced by extrinsic administrative considerations.[7] (App. *infra* A33). Similarly, it was the university acting as an academy which assessed Professor Wirsing's teaching on academic grounds, and evaluated her a superior teacher.

In contrast, the regents were acting in a regulatory capacity, and for purely administrative purposes when they adopted their resolution mandating the use of a standardized form for student evaluation of faculty. The dean, who is himself a member of the academy, was acting as a regulator, not an academician, when he reduced Professor Wirsing's teaching evaluations to the lowest possible score for the administrative purpose of punishing her refusal to administer the standardized evaluation forms.

Clearly, the regulatory acts of the regents and the dean are in conflict with the academy's statement of academic freedom, and interfere with the academy's exercise of its academic freedom to evaluate Professor Wirsing on academic grounds. Professor Wirsing champions not only her own academic freedom to conduct her

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[7] As the regents' evaluation policy has been applied to Professor Wirsing, it is in direct contravention of the university's statement of academic freedom. The regents' policy has been used to discourage Professor Wirsing from acting in accordance with the standards of her profession and to negatively evaluate her teaching based not on any academic grounds but for purely administrative considerations.

classes without government interference, but also represents the academy's interest in evaluating faculty, without government interference.

In defending this suit, the university has asserted and the lower courts agreed that the university's academic freedom includes the right of the regents and administrators to impose a particular method for faculty evaluation. This Court has not previously articulated such a right, but historically has viewed the university's academic freedom as the right to make certain decisions ***on academic grounds.*** *Sweezy*, 354 U.S. at 263. The right to make those decisions is not at issue. The university has already decided ***on academic grounds*** that Professor Wirsing shall teach, that she will teach Foundations of Education, and that she will teach "subject to no control or authority, save the control or authority of the rational methods by which truth is established."[8]

The University of Colorado regents are not invoking academic freedom in defense of the faculty to teach or do research in the face of some impermissible governmental intervention. Nor are the regents invoking academic freedom in behalf of the academic community as a whole, against the interests of one professor. Instead, the claim is that the governing board, itself, under the head of "academic freedom," has the right to impose its own particular connotation of good teaching on its faculty. Administrative authority invoked for such a purpose – as

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[8] The university's academic freedom to decide who shall be admitted to study is not implicated.

a countermine to academic freedom of faculty – cannot rightly be claimed under the head of academic freedom.

What the courts below have identified as the university's academic freedom in this case, is something new, a right of the trustees of the university to control teaching or other than academic grounds. Thus, the case squarely presents an opportunity for this Court to articulate the distinction between the university as regulator and as speaker, and explain the different spheres of authority with respect to the university's academic freedom and the regulatory acts of its regents and administrators.

B. Whether the administration of a state university may exercise its regulatory authority under a claim of academic freedom, in a way that interferes with the teacher's personal academic freedom?

Several courts have noted that the academic freedom rights of the individual teacher and the university may sometimes be in conflict. *Piarowski v. Illinois Community College Dist. 515*, 759 F.2d 625, 629 (7th Cir.), *cert. denied*, 474 U.S. 1007 (1985); *Parate v. Isibor*, 868 F.2d 821, 826-30 (6th Cir. 1989); *Cuesnongle v. Ramos*, 713 F.2d 881, 884 (1st Cir. 1983); *Megill v. Bd. of Regents of State of Florida*, 541 F.2d 1073, 1085 (5th Cir. 1976). This Court has not yet articulated the analysis to be applied in balancing these competing interests.

In the present case, Professor Wirsing seeks only to exercise her academic freedom to teach in accordance with the university's published statement of the principle of academic freedom – to teach truth as she sees it, to

teach according to the highest standards of her profession, and to be evaluated based on the merits of her work. (App. *infra* A32-A33).

On the other hand, the regents assert the university's academic freedom to evaluate faculty, and to regulate the means for such evaluation. The regents' regulation interferes with Professor Wirsing's academic freedom by requiring her to communicate by her actions an idea she knows to be untrue.

If the regents' regulation is a proper exercise of the university's academic freedom, the conflict between academic freedom rights of the teacher and the university is straightforward in this case and presents questions regarding which right should prevail when in conflict. Does the university's academic freedom include the freedom to wield its economic power as an employer to punish a teacher's exercise of her individual academic freedom rights?[9] Does the teacher's academic freedom protect her good faith refusal to comply with a regulation which requires that she act contrary to her own teaching and the standards of her discipline? Does Professor Wirsing in this case represent not only the individual teacher but the university as an academy as well, resolving the conflict against the notion that a public university's

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[9] Arthur Lovejoy's authoritative definition of academic freedom pointed out that although the teacher is in his economic status "a salaried employee," the principle of academic freedom "implies a denial of the right of those who provide or administer the funds from which he is paid, to control the content of his teaching." *See* A. Lovejoy, *supra* n. 6, at 384.

trustees in their regulatory role have any academic freedom whatsoever? This case provides an opportunity for the Court to answer the foregoing questions and articulate the analysis to be applied in balancing these competing interests.

C. Whether the university administration may exercise its regulatory authority under a claim of academic freedom in a way that coerces faculty to adopt a particular ideology, and thus casts a pall of orthodoxy over the classroom?

In *Sweezy v. State of New Hampshire*, 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957), the Court urged vigilance against suppression of ideas, even in its mildest and least repressive form.

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."

Id. at 264 (*quoting Boyd v. U. S.*, 116 U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746 (1886)).

Any evaluation form favors certain teaching methods and theories. The standardized use of a single form which favors a particular philosophical approach to teaching operates to chill the expression of alternative philosophical approaches.

Here, the university evaluates all teachers based on a positivist-realist model. Teachers who do not follow a

positivist-realist philosophy do not exhibit the characteristics about which the form inquires. Thus, faculty are coerced to adopt those particular behaviors in order to achieve satisfactory evaluations, particularly when merit pay awards are based on data from the standardized form.[10] Eventually the alternate philosophic views disappear. That is the antithesis of academic freedom as recognized by this Court and by the university itself.

The trial court reasoned that this case does not rise to a First Amendment issue because the standardized evaluation form invites written comments and has a choice selection "not applicable" that Professor Wirsing's students may select. The lower court is in error in two fundamental respects.

First, as a matter of fact, the use of the "not applicable" option and "written comments" opportunity on the form by Professor Wirsing's students would countermand the dean's stipulation that the standardized form "provides the only comparable data among faculty members" and is "a threshold requirement before the evaluation of teaching will be conducted." (App. *infra* A41, ¶ 5).

More importantly, the standardized form conveys positivist-realist premises about teaching in both its form and substance. The "not applicable" option does not eliminate the central objection: use of the form in any capacity sanctions the authority of the university governing board to communicate and perpetuate one official

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[10] *See* Rénner, *Comparing Professors: How Student Ratings Contribute to the Decline In Quality of Higher Education*, Phi Delta Kappan, October 1981, at 754-755.

ideology of teaching, thereby chilling the intellectual and pedagogical freedoms traditionally associated with American academia.

The hazard is that the chilling effect of the regents' policy may not be readily apparent because the coercion is very subtle, and because the positivist-realist view communicated by the form is consistent with the theory of education dominant in American schools. Generally, the education reform movement sweeping our schools emphasizes quantifiable results subject to objective measurement. For example, in February, 1990, the National Governors' Association developed the following list of America's Education Goals:

1. All children will start school ready to learn.
2. The high school graduation rate will increase to at least 90 percent for all groups.
3. All students will leave grades four, eight, and twelve having demonstrated competency in challenging subject matter including English, mathematics, science, history and geography; and every school in America will ensure that all students learn to use their minds well, so they may be prepared for responsible citizenship, further learning and productive employment in our modern economy.
4. U.S. students will be first in the world in science and mathematics achievement.
5. Every adult American will be literate and will possess the knowledge and skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship.

6. Every school in America will be free of drugs and violence and will offer a disciplined environment conducive to learning.

New York Times, Feb. 26, 1990, at A12, col. 1; *see also Calling for an Overhaul*, Time, Oct. 9, 1989, at 60. These very noble goals for our public schools, all framed in terms of quantifiable objectives, reflect the prevailing positivist-realist view that learning is best evaluated by objective measurement.

Similarly, the national bestseller *Cultural Literacy*, by E. D. Hirsch, Jr., which includes a comprehensive list of "what literate Americans know," E. D. Hirsch, Jr., *Cultural Literacy, What Every American Needs to Know*, 152-215 (1988), reflects a realist philosophy that literacy may be defined by a discrete list of facts, and may be measured by testing one's knowledge of such facts. Also consistent with positivist-realist ideology is the trend toward standardized national achievement testing.

Notwithstanding the rush to improve America's schools, to establish clearly defined goals and the specific methods for their achievement, the popular view that what we should know can be quantified and measured is not universally accepted. Indeed, the current approach to education reform is the subject of considerable criticism within the academic community. *See* Bracey, *Why Can't They Be Like We Were?*, Phi Delta Kappan, October 1991, at 104; Gibboney, *The Killing Field of Reform*, Phi Delta Kappan, May 1991, at 682; J. Spring, *Conflict of Interests: The Politics of American Education* 125-147 (1988); M. Greene, *The Dialectic of Freedom* 6-7 (1988); Scriven, *Summative Teacher Evaluation* in *The Handbook of Teacher Evaluation* 248, 251, 253 (J. Millman ed. 1981); Weaver, *Scientific*

Management and Teacher Education, Educ. F., May 1974, at 485-492.

Based on its present dominance, positivist-realist philosophy will no doubt direct the course of the current effort to reform American schools. However, this should not be to the exclusion of many other valid philosophic approaches followed by teachers with the courage to espouse other than mainstream views.

To evaluate all university faculty members by a computer-read checklist which favors and communicates the prevailing teaching philosophy, chills the expression of alternative ideas and casts a pall of orthodoxy over the classroom. This Court should grant Professor Wirsing's Petition for Writ of Certiorari and address this subtle, progressive, and pervasive abrogation of academic freedom secured by the First Amendment.

II. THE HOLDING THAT PROFESSOR WIRSING'S FIRST AMENDMENT RIGHTS ARE NOT VIOLATED BY THE REGENTS' POLICY AS IT HAS BEEN APPLIED TO HER, IS CONTRARY TO HOLDINGS OF THIS COURT.

A. Professor Wirsing's refusal to administer the standardized evaluation form is expressive conduct protected by the First Amendment.

The lower court's holding that Professor Wirsing's First Amendment rights are not implicated, is contrary to decisions of this Court which recognize that the refusal to engage in government mandated expressive activities, is itself expressive conduct protected by the First Amendment. *Keyishian*, 385 U.S. 589 (teachers' refusal to take a

loyalty oath); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (students' refusal to salute the flag).

In this case, Professor Wirsing refuses to participate in a classroom activity which is expressive of an idea contrary to her own views. Her refusal to express an idea offensive to her is no different than the students' refusal to salute the flag in the *Barnette* case. Her refusal is expressive conduct protected by the First Amendment. The lower court's contrary holding is plain error.

B. The lower court failed to apply a less restrictive means test.

Government regulation of expression, including expressive conduct, is subject to strict scrutiny. *Keyishian*, 385 U.S. 589; *N.A.A.C.P. v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 9 L.Ed.2d 405 (1965). If there is some legitimate government purpose to be served, then the court must evaluate whether the purpose may be served by some means less intrusive of First Amendment rights. *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). When an otherwise lawful regulation of non-expressive conduct has an incidental effect on expressive conduct, the regulation is unconstitutional as applied, unless the interference with First Amendment rights is no greater than is essential to furtherance of some important governmental interest. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984); *U.S. v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Thus, whenever First Amendment

freedoms are implicated, the court must apply a less restrictive means test.

In this case, the regents' mandate on its face regulates the means by which students will express their views about faculty, and is therefore a regulation of expression subject to strict scrutiny. Moreover, as explained above, the regents' mandate regulates faculty expression by economically coercing faculty members to adopt positivist-realist ideology expressed in the standardized evaluation form. The lower court failed to recognize the regents' mandate as a regulation of expression, and therefore did not apply strict scrutiny. Moreover, even if the court viewed the regents' mandate as a lawful regulation of non-expressive conduct, it failed to consider whether the regulation serves an important government interest which might be accomplished by some means less intrusive of First Amendment rights.

CONCLUSION

Petitioner respectfully requests that the Court grant her Petition for Writ of Certiorari and consider the important First Amendment issues this case presents.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MARIE E. WIRSING, Plaintiff-Appellant, v. BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO AND EACH OF ITS MEMBERS, KATHLEEN ARNOLD, RICHARD BERNICK, ROBERT CALDWELL, PETER DIETZE, LYNN ELLINS, HARVEY PHELPS, NORWOOD ROBB, ROY SHORE, and DAVID WINN; WILLIAM GRADY, Dean of the School of Education, University of Colorado at Denver; JOHN BUECHNER, Chancellor of the University of Colorado at Denver; and E. GORDON GEE, President of the University of Colorado, Defendants-Appellants.	)	No. 90-1215 (D.C. No. 90-B-38) (D. Colo.) (Filed Oct. 4, 1991)

ORDER AND JUDGMENT*

Before LOGAN and SEYMOUR, Circuit Judges, and WINDER,** District Judge.

Marie E. Wirsing appeals the district court's grant of summary judgment in favor of defendant Board of Regents of the University of Colorado. We have fully considered Ms. Wirsing's contentions, and we are not persuaded the district court erred.

The judgment of the district court is AFFIRMED.

Entered for the Court

Stephanie K. Seymour
Circuit Judge

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

**The Honorable David K. Winder, District Judge, United States District Court for the District of Utah, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-B-38

MARIE E. WIRSING,

Plaintiff,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO AND EACH OF ITS MEMBERS, KATHLEEN ARNOLD, RICHARD BERNICK, ROBERT CALDWELL, PETER DIETZE, LYNN ELLINS, HARVEY PHELPS, NORWOOD ROBB, ROY SHORE, AND DAVID WINN; WILLIAM GRADY, DEAN OF THE SCHOOL OF EDUCATION, UNIVERSITY OF COLORADO AT DENVER; JOHN BUECHNER, CHANCELLOR OF THE UNIVERSITY OF COLORADO AT DENVER; AND E. GORDON GEE, PRESIDENT OF THE UNIVERSITY OF COLORADO,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed Jun. 28, 1990)

Babcock, J.

The matter is before me on cross-motions for summary judgment. Plaintiff, Dr. Marie Wirsing (Dr. Wirsing) argues in her motion that, as a matter of law, the University of Colorado at Denver's (the University) standardized student evaluation policy interferes with her right to academic freedom under the First and Fourteenth Amendments to the United States Constitution. The University defendants move for summary judgment on the

grounds that the concept of academic freedom does not encompass Dr. Wirsing's right to refuse to follow University regulations and that her refusal to comply with the requirement is not protected from sanction. Dr. Wirsing alternatively contends that genuine issues of material fact exist as to whether standardized student evaluation forms are necessary to evaluate her teaching. Jurisdiction exists pursuant to 28 U.S.C. § 1331. The issue is narrow and it has been briefed by both parties. Oral argument was held Tuesday, June 19, 1990.

Dr. Wirsing is a tenured professor of education at the University's Denver campus, where she has been continuously employed since 1966. In April 1986, the Board of Regents (Regents) enacted an evaluation system to provide information to students, faculty, departmental administration, and the University's administration. Under the system, each campus was required to develop an evaluation form for evaluating teacher performance and awarding yearly merit salary increases. In 1987, the Denver campus developed such a form.

Dr. Wirsing teaches in her classes that teaching and learning cannot be evaluated by any standardized approach. Hence, she has refused to use the standardized course evaluation form, and has used instead a non-standardized student evaluation form used prior to the Regents' 1986 requirement.

In May 1988, Dr. Wirsing's 1987 teaching performance was evaluated by a faculty committee and given the highest rating of 5. Similarly, Dr. Wirsing's 1988 performance was evaluated by her Division Chair, Mark Clarke. He recommended that she receive a 2.5% merit

increase in 1989. In both years, William Grady, Ed.D. (Grady), the Dean of the School of Education at the University, refused to award Dr. Wirsing a merit salary increase for her refusal to administer the Regents' evaluation form. The Chancellor and President agreed with Grady's decision, and the Regents, who have considered Dr. Wirsing's complaints, have refused to exempt her from the rule.

Dr. Wirsing requests that this court enjoin the University from administering the Regents' evaluation form in her classes and that it be required to award her merit salary increases despite her refusal to comply with the Regents' rule.

The term academic freedom "is used to denote both the freedom of the academy to pursue its end without interference from the government . . . and the freedom of the individual teacher . . . to pursue his ends without interference from the academy; and these two freedoms are in conflict." *Piarowski v. Illinois Community College Dist. 515*, 759 F.2d 625, 629 (7th Cir.), *cert. denied*, 474 U.S. 1007 (1985). Thus, while the Supreme Court has often expressed a reluctance to intervene in the prerogatives of state and local educational institutions, it has remained committed to the protection of their academic freedom, "a special concern of the First Amendment." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

The "four essential freedoms" of the university are to determine for itself on academic grounds: 1) who may teach; 2) what may be taught; 3) how it shall be taught; and 4) who may be admitted to study. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957). The administration of

the university rests not with the court, but with the administrators of the institution. *Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1989). Moreover, " . . . school authorities can sanction conduct materially and substantially disrupting school discipline, even though that conduct [is] perhaps not unlawful." *Franklin v. Adkins*, 409 F. Supp. 439, 449 (D.Colo. 1976), *aff'd*, 562 F.2d 1188 (10th Cir. 1977), *cert. denied*, 435 U.S. 994 (1978). Because the university must remain independent and autonomous to enjoy academic freedom, the federal courts are reluctant to interfere in the internal daily operations of the academy which do not directly and sharply implicate basic constitutional values. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). However, the courts have also afforded substantial protection to the First Amendment freedoms of individual university professors. *See Sweezy v. New Hampshire, supra; Fowler v. Board of Educ.*, 819 F.2d 657 (6th Cir.), *cert. denied*,___U.S.___, 108 S.Ct. 502 (1987).

Dr. Wirsing argues that the standardized teaching evaluation forms are contrary to her theory of education. Hence, by being forced to give her students the standardized form, the University is interfering arbitrarily with her classroom method, compelling her speech, and violating her right to academic freedom. I disagree.

Here, the record is clear that Dr. Wirsing was not denied her merit salary increase because of her teaching methods, presentation of opinions contrary to those of the university, or otherwise presenting controversial ideas to her students. Rather, she was denied her merit increase for her refusal to comply with the University's teacher evaluation requirements. As one court has stated:

> Academic freedom is not a license for activity at variance with job related procedures and requirements, nor does it encompass activities which are internally destructive of the proper function of the University or disruptive of the education process.

Stastny v. Bd. of Trustees, 647 P.2d 496, 504 (Wash. App. 1982), *cert. denied*, 460 U.S. 1071 (1983). Further, although Dr. Wirsing may have a constitutionally protected right under the First Amendment to disagree with the University's policies, she has no right to evidence her disagreement by failing to perform the duty imposed upon her as a condition of employment. *Shaw v. Bd. of Trustees*, 396 F.Supp. 872, 886 (D.C.Md. 1975), *aff'd*, 549 F.2d 929 (4th Cir. 1976).

> While a public college faculty member must be free to exercise [her] right to speak on issues of public importance without fear of dismissal from [her] employment, no similar guarantee exists to encourage actions on [her] part which entail failure by [her] to perform duties reasonable and regularly required to be performed by [her] as part of the responsibilities of a faculty member.

Id.

In *Parate supra*, the Sixth Circuit held that because the assignment of a letter grade is intended to send a specific message to the student and is therefore symbolic, a professor's communicative act of assigning the grade is entitled to some measure of First Amendment protection. *Id* at 828. The Court further held that, because giving a grade is protected speech, a professor may not be compelled by university officials to change a grade that the

professor previously assigned to her student. *Id.* The Court specified that it was the act of *"ordering Parate* to change the grade, rather than the act of giving Student 'Y' a different grade than Parate desired" that gave rise to the constitutional violation. *Id* at 829.

Relying on *Parate,* Dr. Wirsing argues that by requiring her to use the standardized evaluation form, the University is regulating her course content and is interfering with her right to academic freedom. Again, I disagree.

Under the Regents' policy, Dr. Wirsing is required to set aside class time for the administration of the forms, bring the forms to class, provide No. 2 pencils, and select a student to distribute and collect the forms. However, Dr. Wirsing is not required to distribute the forms herself. In fact, Dr. Wirsing is required to leave the room while the students complete the evaluation forms. Hence, she is not communicating an idea to her students by allowing them to complete the evaluation forms.

Moreover, the evaluation forms are not expressive of a content-based regulation. *See Sweezy v. New Hampshire,* 354 U.S. 234 (1957). Each form invites written comments and has a choice selection "not applicable" that Dr. Wirsing's students may select if the form, as Dr. Wirsing contends, is irrelevant to her course. Significantly, as the University concedes, Dr. Wirsing may use the form as an example of what not to do; she may criticize openly both the form and the University's evaluation form policy. Further, the evaluation forms are not distributed until the course has been completed substantially. Although the form is contrary to what Dr. Wirsing teaches, her free

speech is not implicated by using the form. Accordingly, I conclude that the evaluation forms represent a University policy and procedure unrelated to course content that in no way interferes with Dr. Wirsing's academic freedom.

Dr. Wirsing further argues that a regulation which interferes with academic freedom is not reasonable. Because I conclude that the University's standard evaluation forms do not interfere with Dr. Wirsing's right to academic freedom, I need not address this issue.

Finally, Dr. Wirsing argues that genuine issues of fact exist as to whether the standardized student evaluation forms are necessary to evaluate her teaching. To the extent that Dr. Wirsing asserts that issues remain as to whether the evaluation form has empirical value, such issues are not material here. Fed. R. Civ. P. 56.

Teacher evaluation is part of the University's own right to academic freedom. *Sweezy v. New Hampshire*, 354 U.S. at 263. Although there may be other available and even more appropriate methods of teacher evaluation, the University has adopted the policy at issue here as its method of evaluation. Because the University's policy does not interfere with Dr. Wirsing's right to academic freedom, the university may require Dr. Wirsing to use its evaluation forms and it may withhold merit pay increases for her refusal to do so. *See Shaw v. Bd. of Trustees*, 396 F.Supp. 872 (D.C.Md 1975), *aff'd*, 549 F.2d 929 (4th Cir. 1976).

Accordingly, it is ORDERED that the University defendants' motion for summary judgment is GRANTED.

It is FURTHER ORDERED that Dr. Wirsing's cross-motion for summary judgment is DENIED.

Dated at Denver, Colorado this 28th day of June 1990.

BY THE COURT:

/s/ Lewis T. Babcock
LEWIS T. BABCOCK, JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Case No. 90-B-38

CERTIFICATE OF MAILING

I hereby certify that a copy of Judgment and Order was mailed to the following on June 28, 1990:

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/s/ Carol Hand
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-___-38

MARIE E. WIRSING,

Plaintiff,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO, and each of its members, KATHLEEN ARNOLD, RICHARD BERNICK, ROBERT CALDWELL, PETER DIETZE, LYNN ELLINS, HARVEY PHELPS, NORWOOD ROBB, ROY SHORE, and DAVID WINN; WILLIAM GRADY, DEAN OF THE SCHOOL OF EDUCATION, UNIVERSITY OF COLORADO AT DENVER; JOHN BUECHNER, CHANCELLOR OF THE UNIVERSITY OF COLORADO AT DENVER; AND E. GORDON GEE, PRESIDENT OF THE UNIVERSITY OF COLORADO,

Defendants.

COMPLAINT

(Filed Jan. 8, 1990)

The plaintiff alleges:

JURISDICTION

1. The court has jurisdiction under 28 U.S.C. § 1331. This action arises under the First and Fourteenth Amendments to the United States Constitution.

PARTIES

2. The plaintiff, a citizen of the United States, is a professor at the School of Education of the University of Colorado at Denver. During all times material she has been so employed and acting.

3. The defendants, the Board of Regents of the University of Colorado, and Kathleen Arnold, Richard Bernick, Robert Caldwell, Peter Dietze, Lynn Ellins, Harvey Phelps, Norwood Robb, Roy Shore, and David Winn, are the duly elected governing body of the University of Colorado. At all times material they have been acting under color of state law.

4. The defendant, William Grady, is Dean of the School of Education of the University of Colorado at Denver. At all times material he has been acting under color of state law.

5. The defendant, John Buechner, is Chancellor of the University of Colorado at Denver. At all times material, he has been acting under color of state law.

6. The defendant, E. Gordon Gee, is President of the University of Colorado. At all times material he has been acting under color of state law.

CLAIM FOR EQUITABLE RELIEF

7. In April, 1986, the defendants, regents of the University of Colorado, passed a resolution requiring that each faculty member including plaintiff, commencing in the fall of 1986, implement procedures for student evaluation of teachers, using a standardized course evaluation form.

8. Plaintiff was on sabbatical leave during the fall of 1986 and thus was first required to use with her students the standardized course evaluation form in the second semester of the 1986-87 academic year.

9. On November 1, 1986, plaintiff advised the defendants, regents of the University of Colorado, by letter of the professional and ethical reasons why she could not comply with their resolution to use a standardized course evaluation form and urged reconsideration of the policy.

10. On January 4, 1988, plaintiff advised the defendant, Dean William Grady, that she would refuse to use any standardized course evaluation form because of "compelling professional and ethical reasons."

11. The plaintiff's academic discipline is Foundations of Education. A stated principle of plaintiff's academic discipline is that teaching and learning cannot be evaluated by any single, mandated, standardized approach, and that the means of assessing teaching and learning are properly reserved to the professional and scholarly judgments of qualified faculty members, operating within the settings of their respective institutions.

12. The official policies of the regents of the University of Colorado (otherwise known as Laws of the Regents) purport to guarantee plaintiff academic freedom and in Article X provide that plaintiff's efforts as an academician "should not be subjected to direct or indirect pressures or interference from within the university . . . [because] faculty members can meet their responsibilities only when they have confidence that their work will be judged on its merits alone."

13. The official policies of the regents also in Article XI require that in establishing salaries "equal consideration shall be given to teaching and research . . . " Because of this policy the evaluation of each professor's teaching in each calendar year determines in significant measure that professor's pay in succeeding academic years.

14. Notwithstanding these regents' policies, the defendants have denied plaintiff merit increases in pay, to which she would otherwise be entitled because of her outstanding work as a teacher, since at least the beginning of the 1987-88 academic year, solely because plaintiff refuses as a matter of conscience to use as an instrument to evaluate her teaching any standardized course evaluation form.

15. The actions of the defendants, and each of them, in denying plaintiff merit increases in pay because of her conscientious refusal to indulge in an evaluation process violative of the principles of her academic discipline, prejudices plaintiff for her exercise of rights protected by the First and Fourteenth Amendments to the United States Constitution, otherwise generally characterized as "academic freedom."

16. Plaintiff has exhausted all avenues of redress within the faculty governance structure of the University of Colorado to no avail, and she has no plain, speedy, adequate remedy at law for the deprivation of her academic freedom.

WHEREFORE, plaintiff prays that the court enjoin defendants, and each of them:

1. To re-evaluate plaintiff's teaching from 1987 forward without regard to her refusal for professional and ethical reasons to use the mandated, standardized, student evaluation form; and

2. To refrain in every way from this time forward from in any manner penalizing plaintiff for her refusal to use standardized forms for assessment of her teaching; and

3. To prospectively adjust plaintiff's pay; and

4. To expunge all records of evaluations offending plaintiff's academic freedom; and

5. To award plaintiff costs and attorney fees in accordance with 42 U.S.C. § 1988;

6. And for such other and further relief as is just in the premises.

Respectfully submitted,

HORNBEIN MacDONALD
FATTOR AND HOBBS P.C.

By /s/ Larry F. Hobbs
Larry F. Hobbs, No. 794
1600 Broadway, #1900
Denver, CO 80202-0419
(303) 861-7070

Attorneys for Plaintiff

Plaintiff's Address:

8167 West 71st Place
Arvada, Colorado 80004

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-___-38

MARIE E. WIRSING,

Plaintiff,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO, AND EACH OF ITS MEMBERS, KATHLEEN ARNOLD, RICHARD BERNICK, ROBERT CALDWELL, PETER DIETZE, LYNN ELLINS, HARVEY PHELPS, NORWOOD ROBB, ROY SHORE, AND DAVID WINN; WILLIAM GRADY, DEAN OF THE SCHOOL OF EDUCATION, UNIVERSITY OF COLORADO AT DENVER; JOHN BUECHNER, CHANCELLOR OF THE UNIVERSITY OF COLORADO AT DENVER; AND E. GORDON GEE, PRESIDENT OF THE UNIVERSITY OF COLORADO,

Defendants.

ANSWER

The Board of Regents of the University of Colorado and defendants, Kathleen Arnold, Richard Bernick, Robert Caldwell, Peter Dietze, Lynn Ellins, Harvey Phelps, Norwood Robb, Roy Shore, David Winn, William Grady, John Buechner, and E. Gordon Gee, hereinafter "University" by their attorneys, the Office of University Counsel, answer plaintiff's complaint as follows:

JURISDICTION

1. The University admits that jurisdiction is proper under 28 U.S.C. Section 1331, except as to those claims and defendants for which the University asserts immunity under the 11th Amendment to the United States Constitution.

PARTIES

2. The University admits all allegations of paragraph 2.

3. The University admits all allegations of paragraph 3.

4. The University admits all allegations of paragraph 4.

5. The University admits all allegations of paragraph 5.

6. The University admits all allegations of paragraph 6.

CLAIM FOR EQUITABLE RELIEF

7. The University admits all allegations of paragraph 7.

8. The University admits all allegations of paragraph 8.

9. The University admits all allegations of paragraph 9.

10. The University admits all allegations of paragraph 10.

11. The University admits that the plaintiff's academic discipline is foundations of education. The University lacks sufficient information to admit or deny the remaining provisions of paragraph 11, and therefore denies same.

12. The University admits all allegations of paragraph 12.

13. The University admits that the official policies of the regents as set forth in Article XI of the Laws of the Regents include the quotation set forth in paragraph 13. The University denies that this excerpt from Article XI sets forth the entire policy of the University regarding criteria for establishing annual salaries for faculty.

14. The University admits that the University defendants have denied Dr. Wirsing merit increases in pay because she has failed to comply with the University-wide policy established by the Regents that an approved course evaluation form must be provided to her students for evaluation of her teaching, and that the results of these evaluations must be provided to her department. The University denies that Dr. Wirsing would otherwise be entitled to merit increases in her salary.

15. The University denies all allegations of paragraph 15.

16. The University admits that Dr. Wirsing has exhausted all avenues of redress regarding her 1987-88 and 88-89 salary. The University denies that she has exhausted avenues of redress within the University system for the years following 1988-89. The University denies the remaining allegations in paragraph 16.

DEFENSES

1. Dr. Wirsing's complaint fails to state a claim for which relief can be granted.

2. Dr. Wirsing seeks money damages in the form of salary adjustments for future years. The State of Colorado is the real and substantial party in interest for this claim for damages. These defendants therefore assert 11th Amendment immunity as to her damages claims.

3. Dr. Wirsing has failed to exhaust her administrative remedies with regard to salary for academic years 1989-90 and forward.

4. Dr. Wirsing has failed to mitigate her damages.

Dated this 29th day of January, 1990.

Respectfully submitted,

OFFICE OF UNIVERSITY COUNSEL

/s/ Beverly Fulton
BEVERLY FULTON, No. 8287
Assistant University Counsel
Special Assistant
Attorney General
University of Colorado
1200 Larimer,
Campus Box 183
Denver, Colorado 80204-5300
(303) 556-4339

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing ANSWER was placed in the U.S. mail, postage prepaid this 29th day of January, 1990 to:

Larry F. Hobbs, Esq.
1600 Broadway, #1900
Denver, CO 80202-0419

/s/ Carolyn Horcher

/OUR RESPONSES ARE CONFIDENTIAL

Use a No. 2 pencil to mark your rating of each item using this scale:

Ⓝ = NOT APPLICABLE

/ERY POOR) = Ⓔ-Ⓓ-Ⓒ-Ⓑ-Ⓐ = (VERY GOOD)

1. Presentation of course material was: Ⓝ Ⓔ Ⓓ Ⓒ Ⓑ Ⓐ
2. Explanation of complex material was: Ⓝ Ⓔ Ⓓ Ⓒ Ⓑ Ⓐ
3. Instructor's motivating of students to explore subject further was: Ⓝ Ⓔ Ⓓ Ⓒ Ⓑ Ⓐ
4. ccessibility of Instructor was: Ⓝ Ⓔ Ⓓ Ⓒ Ⓑ Ⓐ
5. Explanations of assignments were: Ⓝ Ⓔ Ⓓ Ⓒ Ⓑ Ⓐ
6. Work required for course was: A: too much; C: appropriate; E: too little; for credit given. Ⓝ Ⓔ Ⓓ Ⓒ Ⓑ Ⓐ
7. Relevancy of assignments to course was: Ⓝ Ⓔ Ⓓ Ⓒ Ⓑ Ⓐ
8. Fairness of grading policies was: Ⓝ Ⓔ Ⓓ Ⓒ Ⓑ Ⓐ
9. Coverage of important rather than trivial points in grading udents was: Ⓝ Ⓔ Ⓓ Ⓒ Ⓑ Ⓐ
10. Course as a learning experience was: Ⓝ Ⓔ Ⓓ Ⓒ Ⓑ Ⓐ
11. Rate this course compared to all your other university courses: Ⓝ Ⓔ Ⓓ Ⓒ Ⓑ Ⓐ
12. Rate this instructor compared to all your other university instructors: Ⓝ Ⓔ Ⓓ Ⓒ Ⓑ Ⓐ

FACULTY COURSE QUES

DEPT. ⓪ ① ②
CAMPUS ⓪ ① ②
COURSE ⓪ ① ②
SECTION ⓪ ① ②

646 CLARITY OF COURSE OBJECTIVES WAS:

648 THIS COURSE BUILT ON OT COURSES I HAVE TAKEN: A=VERY MUCH TO E=LITTLE

650 THE QUALITY OF INDIVIDU ASSISTANCE PROVIDED BY T TEACHING ASSISTANT WAS:

652 WOULD YOU CHOOSE ANOTHE COURSE WITH THIS INSTRUC A=DEFINITELY TO E=NEVER

SCANTRON® FORM NO T-101653-UOC

TIONNAIRE

UNIVERSITY OF COLORADO

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647 QUALITY OF TEXTBOOKS AND SUPPORTING MATERIALS WAS:

649 THE QUALITY OF INDIVIDUAL ASSISTANCE PROVIDED BY THE INSTRUCTOR WAS:

651 INSTRUCTOR ENCOURAGED INDEPENDENT THOUGHT: A=VERY MUCH TO E=LITTLE

653 INSTRUCTOR'S SENSITIVITY TO THE BACKGROUND AND PREPARATION OF STUDENTS WA

NOW FILL IN REVERSE SIDE

BEST AVAILABLE COPY

BEST AVAILABLE COPY

PLEASE PRINT! FORMS WILL BE RETURNED TO FACULTY AFTER SEMESTER END.

I. The MOST effective aspects of this course were:

PLEASE DO NOT MARK IN SHADED AREA

II. The LEAST effective aspects of this course were:

III. The best ways to improve this course would be to:

PLEASE DO NOT MARK IN SHADED AREA

Use this area for additional questions provided by your instructor or for further comments.

For further comments include a separate sheet.

PLEASE DO NOT MARK IN SHADED AREA

1. RESOLVED: That beginning with the fall semester, 1986, Faculty-Course Evaluation shall be universal at the University of Colorado for all courses and their sections offered by any of the University of Colorado campuses. The evaluation forms will be specific for the type of course in question and adaptable to the individual campus' research and testing services. The evaluation system shall be designed to provide information to students, faculty, departmental administration, and the University's administration.

   FURTHER RESOLVED: That a University committee, hereafter referred to as the Committee on Faculty-Course Evaluation, shall be established to oversee the operations of the evaluation system. The University Committee shall consist of three students appointed by the Intercampus Student Forum, three faculty members appointed by the Faculty Council,-one representative from the University Office of Management Systems, and one member from the President's Office. Individual campus committees shall also be established to oversee the design, implementation, and information distribution process of the Faculty-Course Evaluation for each campus. The campus committees shall consist of three students appointed by the campus student government, three faculty members appointed by the campus faculty council, one member from the campus office of research and testing services, and one member from the campus Chancellor's office. Student and faculty appointments will give special consideration to draw on the broadest representation among the schools on the campuses.

   The campus committees shall also be responsible for presenting a yearly operations budget for the collection and dissemination of information.

FURTHER RESOLVED: That monies shall be made available from the general fund allocation to meet the following budget requirements:

- Establishment and operating funds for the University and campus Faculty-Course Evaluation Committees.

- Expansion and operation for faculty-course evaluation of the campus offices of research and testing.

2. STATEMENT OF INFORMATION:

Since the fall of 1975, the Boulder campus has been implementing each semester a Faculty-Course Questionaire (FCQ) for all tenured and tenure-track professors. Other interested instructors had the service available to them on a fee-for-service basis, most recently for a charge of $1.00 per section and $.13 per form ordered. These fees are designed to cover only operating expenses associated with the section surveyed. Beginning in the spring of 1986, all courses and sections on the Boulder campus will automatically go through this process.

A January 29, 1986 report issued on the FCQ by the Boulder Office of Research and Testing is attached. It examines the history and mission, current procedures and policies, utility, and strengths and weaknesses of the FCQ at Boulder and of similar processes across the nation.

The Colorado Springs campus and the Denver campus have no established policy. Individual deans have the option to implement FCQ's on formats of their own design, which are not published as campus information sources.

The Health Sciences Center also has no system policy and allows individaul [sic] deans the option to establish their own FCQ process. The Course Evaluation Committee meets periodically to discuss FCQ's within a broader context. Those areas which do offer FCQ's make the results available to the professors evaluated and the course directors involved.

3. PREVIOUS ACTIONS:

At the June 25, 1975 Board of Regents meeting, the Regents adopted a similar policy that applied only to the Boulder campus. It calls for:

- An FCQ developed by a committee composed of students, faculty, research and testing, and chancellor's representatives.
- The committee to be responsible for overseeing the development, periodic re-design, and distribution of the results to students, faculty, departmental administrators, and University administrators of the FCQ.
- The committee to develop a yearly operations budget.
- The availability of monies from the general fund to meet the needs of the budget and any necessary expansion of the Office of Research and Testing to meet the needs of the FCQ.

PROCEDURES FOR ADMINISTERING THE FACULTY COURSE EVALUATIONS AT CU-DENVER

July 1987

COURSES REVIEWED

All courses taught in Schools and Colleges by regular, part-time and honorarium faculty members during the fall, spring and summer sessions will be reviewed using the standard form.

THE STANDARD FORM

CU-Denver will employ a standard course evaluation form. This form includes the twelve questions used on the CU-Boulder form *plus* eight new questions. The set of 20 will be applied to every course that is evaluated. This ensures continuity as individual teaching performance is tracked over time. The additional eight questions have been provided to broaden the scope of the evaluation. Individual faculty members will be invited to identify up to five additional optional questions that would apply to their individual courses. The maximum number of questions for any one class therefore would normally be twenty-five. Upon approval by the Dean, however, an additional five optional questions may be listed. The required questions are listed in a separate attachment.

ADMINISTRATION

For the near term, at least, the form will be administered by the CU-Boulder Office of Research and Testing. All chairs should be informed of our requirement and they should provide appropriate lists to that Office so that

questionnaires can be supplied for each course, when this information is solicited at the start of each semester.

QUESTIONNAIRE PROCEDURES

All questionnaires are to be administered between the 13th and 15th weeks of the semester. The questionnaire should normally be administered at the beginning of class. Chairs are to identify a student in each class who would actually administer the process. This student would receive the package of forms from the professor, read the standard introduction to the class, provide "Number 2" pencils, collect the forms, and return the forms to the chair or dean (as determined by the dean). Faculty members are not to administer the process, and are to avoid any impression of intimidation. Faculty members should not be in the room at the time the questionnaire is administered, nor are they to collect the questionnaires when completed. Completed questionnaires and summary-tabulations will be returned to chairs once the forms have been processed. Chairs will provide these to the individual instructors. In no instance, however, are these to be returned to chairs or instructors before the semester's grades have been submitted. Students should be informed of this practice.

PUBLICATION

The Regents' mandate requires that the results of the evaluations be made available to the Student Government. CU-Denver will provide both the cursory summary tabulations for all twenty questions and the detailed tabulations to Student Government, for its use. It is likely

that only the brief summaries will be published. The detailed summaries may be made available to students by the Student Government by placing them at key locations around campus, such as the Auraria Library.

FINAL NOTE

Thank you in advance for assisting in this effort. The Teaching Committee believes a close monitoring of teaching is very important in the process of strengthening instruction at CU-Denver. But it also cautions that the evaluation of teaching should not stop with course evaluation questionnaires. A wider array of approaches, beyond this, is strongly encouraged.

STANDARDS for Academic and Professional Instruction in Foundations of Education, Educational Studies, and Educational Policy Studies

of the Council of Learned Societies in Education

Introduction

The Standards for Academic and Professional Instruction in Foundations of Education, Educational Studies, and Educational Policy Studies are presented to the educational community by the Council of Learned Societies in Education on behalf of the seven member societies of the Council – the American Educational Studies Association, the Comparative and International Education Society, the History of Education Society, the John Dewey Society, the Philosophy of Education Society, the Society for Educational Reconstruction, and the Society of Professors of Education. Each of these national organizations has endorsed and adopted the Standards.

The Standards were originally developed on behalf of the American Educational Studies Association by its Task Force on Academic Standards in 1977. The members of that Task Force were: Joseph L. DeVitis (co-chairperson), University of Tennessee at Martin; Barbara Finkelstein, University of Maryland; Alan H. Jones, then of the Michigan Conference of the American Association of University Professors and now with Prakken Publications, Inc.; Glorianne M. Leck, Youngstown State University; J.

Don Reeves, Wake Forest University; C.J. Schott, University of Lethbridge; William Schubert, University of Illinois at Chicago Circle; Donald R. Warren (co-chairperson), then of the University of Illinois at Chicago Circle and now at the University of Maryland; and *Marie E. Wirsing,* University of Colorado at Denver. Following formal adoption of the Standards by the American Educational Studies Association, they were published in the winter 1977-78 issue of *Educational Studies,* pages 329 to 342. Reprints of the Standards were prepared with support from the University of Illinois at Chicago Circle and Wake Forest University, and received wide initial distribution in 1978.

During the years since, each of the other member societies of the Council of Learned Societies in Education has reviewed, endorsed, and adopted the Standards, and the Council has assumed proprietorship and responsibility for further dissemination and advocacy on behalf of all of the societies. The Standards have also been endorsed and adopted by the Canadian Association of Foundations of Education.

The Standards were originally constructed by the Task Force on Academic Standards on the basis of wide and systematic consultation with Association members and other educational scholars and practitioners. They provide rationales and evaluation criteria for Foundations of Education study in graduate and undergraduate programs, in-service training for educational practitioners, and professional development of faculty. In recent years Foundations of Education faculty at some institutions have reorganized their departments and/or

programs around Educational Studies or Educational Policy Studies. On other campuses, new academic units, interdepartmental research centers, and/or programs in Educational Studies or Educational Policy Studies have emerged independently of the Foundations of Education. In relating evaluation standards to instruction in Educational Studies and Educational Policy Studies, in addition to Foundations of Education, the Council of Learned Societies in Education acknowledges the kinship and similarity of purpose and rationale shared by these three areas of study. They represent the predominant academic and professional focus of member societies of the Council. In the pages that follow, the term "foundational studies" is frequently employed as an abbreviated reference to academic and professional instruction in these three areas of study.

* * *

Assessment of Foundations of Education Programs

North American colleges and universities presently are responding to a distinctive climate of accountability. This climate, representing both a movement and a cluster of associated ideas, insists on educational programs that are designed to reflect competency-based learning expectations and to achieve explicitly stated behavioral objectives.

The Council of Learned Societies in Education, exercising the interpretive, normative, and critical functions of its member societies, herein calls attention to the implications of mandated competency-based education. Such a

policy automatically establishes a given normative attitude of educational practitioners; it universalizes a single standard of presumed correctness. The imposition of any single intellectual outlook and associated behavior raises grave questions relative to education in a democratic society. With respect to Foundations of Education, Educational Studies, and Educational Policy Studies, in particular, attention is directed to the interpretive, normative, and critical functions of these related fields of study. To formulate and assess Foundations of Education programs within a competency-based frame of reference, as a matter of education policy, would undermine the basic rationale of this academic and professional field – the free and open inquiry into *all* normative issues; the unfettered questioning of what is, and what ought to be. More fundamentally, such a policy would severely weaken the essential contribution of foundational studies to the preparation of educational professionals.

The Council of Learned Societies in Education proposes that the formulation of program objectives for Foundations of Education, Educational Studies, and Educational Policy Studies, and the means of assessing them, be matters that are properly reserved to the professional and scholarly judgments of qualified faculty members, operating within the settings of their respective colleges and universities, utilizing the Standards set forth in this document.

* * *

PART SIX
ACADEMIC AND GENERAL POLICIES FOR FACULTY

1. ACADEMIC FREEDOM

Source: Article X, Laws of the Regents

The University of Colorado was created and is maintained to afford to young men and women a liberal education in the several branches of literature, arts, sciences, and the professions. These aims can only be achieved in that atmosphere of free inquiry and discussion which has become a tradition of universities and is called academic freedom. For this purpose, academic freedom is defined as the freedom to inquire, discover, publish, and teach truth as the faculty member sees it, subject to no control nor authority save the control and authority of the rational methods by which truth is established. Within the bounds of this definition, academic freedom requires that members of the faculty must have complete freedom to study, to learn, to do research, and to communicate the results of these pursuits to others. The students likewise must have freedom of study and discussion. The fullest exposure to conflicting opinions is the best insurance against error. Academic freedom does not give either the faculty or students the right to disregard the Standards of Conduct as outlined in Article XIV, 2, of these Rules.*

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*The applicable portion of Article XIV, 2, follows: "University students, faculty, and staff shall refrain from conduct disruptive of University functions; from injury to persons or damage

(Continued on following page)

Where such freedom prevails, faculty members have the responsibility of maintaining competence; of exerting themselves to the limit of their intellectual capacities in scholarship, research, writing, and speaking; and of acting on and off the campus with integrity and in accordance with the highest standards of their profession. While they fulfill this responsibility, their efforts should not be subjected to direct or indirect pressures or interference from within the University, and the University will resist to the utmost such pressures or interference when exerted from without. Faculty members can meet their responsibilities only when they have confidence that their work will be judged on its merits alone. For this reason the appointment, promotion, and dismissal of faculty members should be based primarily on the individual's ability in teaching, research, writing, or other scholarly activities and should not be influenced by such extrinsic considerations as political, social, or religious views, or views concerning departmental or University operation or administration.

The students, also, within the limits of academic discipline, have equivalent responsibility for study and learning. They, too, should be judged on the merits of their performance without reference to their political, social, or religious views.

(Continued from previous page)

to property on the campus; and from impeding freedom of movement of students, school officials, employees, and invited guests to all facilities of the University. Interference in any manner with the public or private rights of citizens, or conduct which threatens or endangers the health or safety of any persons, or damage to property will not be tolerated. . . . "

The faculty member is entitled to freedom in the classroom in discussing the subject, but should be careful not to introduce into teaching controversial matter which has no relation to the subject.

Faculty members are citizens, members of learned professions, and officers of an educational institution. When speaking or writing as citizens, they should be free from University censorship or discipline, but their special position in the community imposes special obligations. As persons of learning and as educational officers, they should remember that the public may judge their profession and institution by their utterances. Hence faculty members should be accurate at all times, should exercise appropriate restraint and show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-B-38

MARIE E. WIRSING,

Plaintiff,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO, and each of its members, KATHLEEN ARNOLD, RICHARD BERNICK, ROBERT CALDWELL, PETER DIETZE, LYNN ELLINS, HARVEY PHELPS, NORWOOD ROBB, ROY SHORE, and DAVID WINN; WILLIAM GRADY, DEAN OF THE SCHOOL OF EDUCATION, UNIVERSITY OF COLORADO AT DENVER; JOHN BUECHNER, CHANCELLOR OF THE UNIVERSITY OF COLORADO AT DENVER; and E. GORDON GEE, PRESIDENT OF THE UNIVERSITY OF COLORADO,

Defendant.

AFFIDAVIT OF MARIE E. WIRSING

STATE OF COLORADO)
) ss.
City and COUNTY of Denver)

I, MARIE E. WIRSING, first being duly sworn, depose and state as follows:

1. My name is Marie E. Wirsing. I am a tenured Professor of Education at the University of Colorado at Denver, where I have taught since 1966. Over the years, my teaching has consistently been evaluated as superior,

and I have received a number of teaching awards. Most recently I received the Celebration of Excellence Award from the Colorado Department of Education in the Spring of 1987.

2. My academic discipline is Foundations of Education. From 1975 through 1977, I was a member of the National Task Force that developed standards which govern my field of academic and professional expertise. The *Standards for Academic and Professional Instruction* were originally adopted by the American Educational studies Association. Over the years they have been endorsed and promoted by all the Foundations of Education associations belonging to the prestigious Council of Learned Societies in Education. (*See* Exhibit F, attached.) The *Standards* require that assessment of Foundations of Education programs be "properly reserved to the professional and scholarly judgments of qualified faculty members . . . " (Exhibit F, page 6.)

3. I have published a number of writings, and been an invited speaker and guest lecturer at colleges, universities and national conventions throughout the United States.

4. Since the Regents' resolution in 1986 requiring use of a standardized student evaluation form (Exhibit G), I have objected to the policy by written communication to the Regents and to the Dean, by way of a speech before the C.U./Boulder American Federation of Teachers, and by guest editorial in the *Silver And Gold Record*.

5. I have always complied with the School of Education policy to use student evaluation forms for all of my

classes. Since the Regents' 1986 resolution requiring use of a standardized student evaluation form, I have continued to use the student evaluation form I have used since 1966. (Exhibit H).

6. I object to the standardized student evaluation form because it reflects the *a priori* philosophic assumptions of positivism-realism – i.e., premises that view knowledge and values as objective, predetermined, universal, discrete, and quantifiable. I am an existentialist, and view knowledge and values as subjective, emerging, personal, wholistic, and non-quantifiable. The standardized form required by the Regents measures characteristics which may be of concern to those who teach from a positivism-realism philisophy, but cannot fairly assess the capabilities of those who teach from any philosophy other than positivism-realism.

More importantly, the form implicitly conveys the belief that there is a commonly accepted body of "good teaching characteristics." I am an educational historian. There is no scholarly evidence from over 2400 years of western history that even remotely suggests agreement on what constitutes good teaching. Great teachers throughout history have but one thing in common: they have taught with uncompromising integrity from their respective beliefs.

Were I to use the standardized form, I would undermine my long-standing reputation as a scholar by tacitly sanctioning the false belief that there is an objectified body of commonly accepted "good teaching characteristics" that *legitimately* can be institutionalized by the University of Colorado.

7. In 1988, I was on the Faculty Evaluation Committee responsible for evaluating 1987 performance. I did not participate with the Committee in the evaluation of my own performance. Based on the Committee's evaluation, I was assigned a composite rating of 4.76, which rating was reduced by Dean Grady to a 2.26. (*See* Exhibit I, attached.) Although the Committee had given me the highest possible rating of 5 in the area of teaching, Dean Grady reduced this rating to zero.

8. After the Faculty Evaluation Committee communicated its recommendations to Dean Grady, the Dean met with us on June 1, 1988, and provided us with his revised faculty merit ratings (Exhibit J), and a list of those individuals whose ratings had been changed. (Exhibit K). I compared the Dean's ratings with the ratings of our Committee, and found that he had increased the ratings of 10 professors, and that I was the only professor whose rating had been decreased. As a result of the Dean having reduced my rating, I received no merit pay increase in 1988.

9. In Spring, 1989, my 1988 performance was evaluated by my Division Chair, Mark Clarke. Dr. Clarke evaluated my performance as "meritorious" and recommended that I receive a 2.5% increase. I understood that in addition to the merit increase recommended by Dr. Clarke, there was an equal sum of money to be distributed by Dean Grady for merit increases.

10. The faculty evaluation and salary adjustment form completed by Dean Grady indicates that he rated my teaching at zero and recommended a 1.5% merit increase, amounting to $563.00. (Exhibit L, attached).

11. On April 16, 1990, I met with Associate Dean and Division Chair Mark Mahlios, regarding his evaluation of my 1989 performance. Dr. Mahlios advised me that on a 1 – 4 scale, four being highest, he had rated my teaching as 3. When I asked how he had determined that rating, he indicated that my rating would have been a 4, but for the fact that I had not used the standardized student evaluation form mandated by the Regents.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Marie E. Wirsing
Marie E. Wirsing

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

Subscribed and sworn to before me by Marie E. Wirsing this 28th day of April, 1990.

My Commission expires: August 8, 1993.

(Seal)

/s/ Toni G. Salerno
Toni G. Salerno, Notary Public
1600 Broadway, #1900
Denver, CO 80202-0419

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 90-B-38

MARIE E. WIRSING

Plaintiff,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO, AND EACH OF ITS MEMBERS, KATHLEEN ARNOLD, RICHARD BERNICK, ROBERT CALDWELL, PETER DIETZE, LYNN ELLINS, HARVEY PHELPS, NORWOOD ROBB, ROY SHORE, AND DAVID WINN; WILLIAM GRADY, DEAN OF THE SCHOOL OF EDUCATION, UNIVERSITY OF COLORADO AT DENVER; JOHN BUECHNER, CHANCELLOR OF THE UNIVERSITY OF COLORADO AT DENVER; AND E. GORDON GEE, PRESIDENT OF THE UNIVERSITY OF COLORADO,

Defendants.

AFFIDAVIT OF DEAN WILLIAM GRADY

William Grady, being first duly sworn, states under oath:

1. My name is William Grady. I am the Dean of the School of Education at the University of Colorado at Denver.

2. The School of Education has established committees of faculty to evaluate each member of my faculty in the areas of teaching, research, and service. The results of

these evaluations determine the merit salary increases given to each faculty member annually.

3. Dr. Marie Wirsing is a member of the curriculum and instruction program area of the School of Education.

4. Absent some extraordinary circumstance, I accept the recommendations of the advisory committees and generally assign merit increases based directly on the evaluations of the faculty given to me by the advisory committees.

5. To be evaluated in the category of teaching, each faculty member must administer the regent-mandated student evaluation form to each class taught during all semesters on which the evaluation is based. This student evaluation form provides the only comparable data among the faculty members. In addition to being a threshold requirement before evaluation of the teaching category will be conducted, it is also heavily relied upon by the faculty evaluation groups. In the program area of curriculum and instruction, some faculty members submit information in addition to the regent-mandated student evaluation form. However, the evaluation form is accorded at least 75% weight in determining the evaluation in the category of teaching.

6. The evaluations which will take place in the spring of 1990 will evaluate teaching for the spring and fall semesters of 1989. If Dr. Wirsing has not administered a student evaluation form to those classes, which have concluded, there is no way at this point for either us or Dr. Wirsing to remedy that situation. We have no more information or ability to evaluate her teaching for those

semesters now than we would have in two or three months.

7. The conclusion of classes for the spring, 1990 term is May 11, 1990. Evaluation of teaching for the spring, 1990 term will take place in the spring of 1991.

8. While the University insists that Dr. Wirsing administer the required student evaluation form in accordance with the prescribed procedures, there is absolutely no barrier imposed by myself or anyone else at the University to Dr. Wirsing:

a. Using her own student evaluation form or methods in addition to those required by the Regents. In the program area of curriculum and instruction, she may also submit these additional evaluations and they will be used in evaluating her teaching according to the current procedures used by that program area. (Each program area designs its own evaluation system within certain limits; the regent-mandated procedures must be used by all program areas); and/or

b. Using the required student evaluation form to demonstrate to her classes the pitfalls she sees in such a procedure. Dr. Wirsing is free to criticize the form and procedures in any forum, including her classes.

FURTHER, AFFIANT SAYETH NOT.

/s/ William Grady
WILLIAM GRADY, DEAN
SCHOOL OF EDUCATION

STATE OF COLORADO)
)
COUNTY OF Denver)

Subscribed and sworn to before me by Dean William Grady on this 5th day of March, 1990.

Witness my hand and official seal.

My commission expires: 2/18/92

/s/ Bobbie J. Schupput
NOTARY PUBLIC

AFFIDAVIT OF LYNN RHODES

STATE OF COLORADO)
) ss.
COUNTY OF Denver)

LYNN RHODES, being first duly sworn, states under oath:

1. My name is Lynn Rhodes. I am a Professor of Education at the University of Colorado at Denver.

2. In May, 1988, I served as Chair of the Faculty Evaluation Committee responsible for the evaluation of the 1987 calendar year. Our evaluations were based on selected criteria established by the Regents as appropriate, and certain additional criteria added by the professors. The criteria used for evaluation are established in three basic areas: (1) teaching; (2) research/creative work; and (3) service. (See Exhibit A attached). Each professor submitted a cover letter summarizing the year's accomplishments, a form specifying the weight to be assigned each of the three general areas, and support materials.

3. Professor Wirsing submitted a form which indicated that her evaluation should be weighted 50% in the area of teaching, 30% in the area of research/creative work, and 20% in the area of service. (See Exhibit B attached). She also submitted student evaluation forms, considerable course materials, documentation of teaching award, and copies of her publications.

4. The Committee evaluated Professor Wirsing based on the information she provided, the weights she assigned, and personal knowledge of her capabilities. On

a scale of 1 to 5, 5 being best, Professor Wirsing was rated 5 in the area of teaching, 4.6 in the area of research and creative work and 4.4 in the area of service. The composite merit rating assigned to Dr. Wirsing by the Committee was 4.76. (See Exhibit B attached).

5. By letter dated May 10, 1988, the Committee's rankings were communicated to Dean Grady. (Exhibit C). Page 2 of Exhibit C attached indicates that Dr. Wirsing's composite rating was second highest of 35 professors.

6. In evaluating Professor Wirsing's teaching, the Committee considered the student evaluation forms she submitted. The student comments about Dr. Wirsing were all very positive and indicated that the students considered her to be an excellent professor. We also considered her course materials and her receipt of the Colorado Department of Education Celebration of Excellence Award in Spring, 1987. Those of us who had personal knowledge offered peer evaluation of Dr. Wirsing's teaching.

7. The Committee had no difficulty in considering the data contained in Dr. Wirsing's student evaluation forms or in comparing this data to the data in the student evaluation forms submitted by other teachers. In my experience, the narrative form used by Dr. Wirsing, and the comparable narrative portion of the Regents' standardized form is more useful in evaluating teacher performance than the multiple choice portion of the Regents' form.

8. Sometime after we sent our recommendations to Dean Grady, Dean Grady met with the Committee to

discuss those changes he had made in our recommendations. Dean Grady had increased ten of the ratings, and decreased Dr. Wirsing's rating from a composite rating of 4.76 to a composite rating of 2.26, based on his determination that her rating for teaching must be zero. I was surprised by the Dean's modifications to our ratings because when I had previously served on Faculty Evaluation Committees, our recommendations had been accepted without modification.

9. I estimated that I had spent between 55 and 60 hours on the 1988 evaluation process. I believe the other faculty members spent a comparable amount of time. Because so many of our ratings were modified by the Dean, and because our ratings were criticized by some of the professors, I was unwilling to serve on the Faculty Evaluation Committee for a second year. Subsequent to our meeting with the Dean, five of the six Committee members met and none of the five were willing to serve on the Committe [sic] for a second year. As a result, the Committee was dissolved and faculty merit increases were recommended by Division Chairs the following year.

Further, Affiant saith not.

/s/ Lynn K. Rhodes
LYNN RHODES

Subscribed and sworn to before me this 27th day of April, 1990, by Lynn Rhodes.

WITNESS my hand and official seal.

(SEAL)

/s/ Toni G. Salerno
NOTARY PUBLIC

1600 Broadway, #1900
Address

Denver, CO 80202

My Commission Expires: August 8, 1993.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-B-38

MARIE E. WIRSING,

Plaintiff,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO, and each of its members, KATHLEEN ARNOLD, RICHARD BERNICK, ROBERT CALDWELL, PETER DIETZE, LYNN ELLINS, HARVEY PHELPS, NORWOOD ROBB, ROY SHORE, AND DAVID WINN; WILLIAM GRADY, DEAN OF THE SCHOOL OF EDUCATION, UNIVERSITY OF COLORADO AT DENVER; JOHN BUECHNER, CHANCELLOR OF THE UNIVERSITY OF COLORADO AT DENVER; AND E. GORDON GEE, PRESIDENT OF THE UNIVERSITY OF COLORADO,

Defendant.

AFFIDAVIT OF MARK CLARKE

STATE OF COLORADO)
) ss.
City and COUNTY of Denver)

I, MARK CLARKE, being first duly sworn, state under oath:

1. My name is Mark Clarke. I am an Associate Professor of Education at the University of Colorado at Denver.

2. In Spring, 1989, in my capacity as Chair of the Language, Literacy and Culture Division of the School of Education, I evaluated the performance of six (6) professors in my division, including Dr. Marie Wirsing. Each professor was evaluated in the areas of scholarship, teaching, and service. My evaluation in the area of teaching was based on my own personal knowledge of the professors' teaching capabilities, and on the supporting documents presented from each professor, including student evaluation forms.

3. I had no difficulty in evaluating the information contained in the student evaluation forms submitted by Dr. Wirsing, or in comparing that information to similar data provided in the student evaluation forms submitted by the other professors. My analysis of Dr. Wirsing's student evaluations is reflected under the heading "Teaching" in my May, 1989, evaluation, attached as Exhibit D.

4. After I completed my evaluations, I determined that all six (6) professors deserved an evaluation of "meritorious" and recommended to Dean Grady that each receive a merit increase of $938.50. (*See* Exhibit E, attached.) This recommendation represents a range of increases from 2.5% to 3.6%, with Dr. Wirsing's recommended increase being 2.5%. I understood that in addition to the $5,631.00 I allocated, there was a comparable sum of money available to the Dean to distribute based on his determination of merit. Dean Grady had indicated to me that he would distribute that money in accordance with my recommendations. Thus, I believed that my recommended increase of 2.5% for Dr. Wirsing, would result in a total increase of 5%.

5. Dean Grady did not adopt my recommendations for merit pay increases.

6. Since Dean Grady first came to the School of Education, the procedure for faculty evaluation has been changed each spring. Each year committee members have resigned in frustration when their findings have been distorted by the Dean. In Spring, 1989, the Faculty Evaluation Committee process was abandoned, and the responsibility for faculty evaluation fell to the Division Chairs.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Mark A. Clarke
Mark Clarke

Subscribed and sworn to before me by Mark Clarke this 27th day of April, 1990.

My Commission Expires: Nov. 3, 1991

(SEAL)

/s/ D. Andrew Winston
Notary Public
Address:
1600 Broadway, #1900
Denver, CO 80202

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 90-B-38

MARIE E. WIRSING,

Plaintiff,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO, and each of its members, KATHLEEN ARNOLD, RICHARD BERNICK, ROBERT CALDWELL, PETER DIETZE, LYNN ELLINS, HARVEY PHELPS, NORWOOD ROBB, ROY SHORE, and DAVID WINN; WILLIAM GRADY, DEAN OF THE SCHOOL OF EDUCATION, UNIVERSITY OF COLORADO AT DENVER; JOHN BUECHNER, CHANCELLOR OF THE UNIVERSITY OF COLORADO AT DENVER; and E. GORDON GEE, PRESIDENT OF THE UNIVERSITY OF COLORADO,

Defendant.

AFFIDAVIT OF MARIE E. WIRSING

I, MARIE E. WIRSING, first being duly sworn, depose and state as follows:

1. For the spring semester of 1990, I have received from the University two (2) documents which explain the process to be used in administering the standardized student evaluation forms. These documents are attached as Exhibits A and B.

2. I understand from these documents that the process requires my involvement in the following respects:

a. I am required to set aside class time for the administration of the forms.

b. I am required to provide No. 2 pencils for the students' use.

c. I am required to bring the forms to class.

d. I am required to select a student to distribute and collect the forms.

e. I am required to leave the room while the students complete the evaluation forms.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Marie E. Wirsing
Marie E. Wirsing

STATE OF COLORADO)
)
CITY AND COUNTY) ss.
OF DENVER)

Subscribed and sworn to before me by Marie E. Wirsing this 19th day of June, 1990.

My Commission expires: August 8, 1993.

(SEAL)

/s/ Toni G. Salerno
Toni G. Salerno, Notary Public
1600 Broadway, #1900
Denver, CO 80202-4969

SOE's procedure for administering and routing the evaluation forms:

1) *The Asst Deans office will distribute the packets to the Division secretaries who will see that each instructor gets a packet for each course s/he is teaching.* The packet will bear an INTERCAMPUS mailing label addressed:

   Asst Dean for Education
   School of Education CU-Denver
   UCD Campus Box 106
   North Classroom 5012

   Special care should be taken to personally contact Honoraria faculty so they can either pick their packets up in person or have them placed in a designated mailbox. In most Honoraria cases this would involve calling the instructor to make arrangements.

2) Each instructor will select a responsible student to distribute and collect the questionnaires. This student will collect the questionnaires and return them to the envelope provided.

3) *Inside* each envelope are "Instructions for Administration" of the evaluations. The selected student should go over those instructions *carefully. The student must sign his/her name in the blanks at the bottom of the "Instructions for Administration" and complete the other blanks.*

4) The questionnaires and the signed "Instructions for Administration" should be put back into the envelope and the envelope must be sealed.

5) Depending on whether or not the course is after School of Education office hours the student can do one of two things:

a) Return the envelope by hand to the Dean's Office in North Classroom 5012 and give it to Helen, Debbie or Lu.

b) Drop the envelope in the *intercampus mailbox*. This mailbox is located on the first floor of the North Classroom, at the Lawrence and Speer end of the building near the elevators.

6) Personnel in the Asst Dean's Office will check off all returned envelopes against a master list. Division Secretaries will be given the names of those faculty whose evaluations are *unaccounted for*. The Division Secretaries will pursue those faculty about the missing evaluations.

7) Evaluations will boxed [sic] and sent back to Boulder at the address given under question one above.

8) Once the questionnaires have been processed the results will be sent back to the SOE from Boulder. These will be turned over to Dean Grady's office (Lorrie Spears). The Dean's staff will distribute the results and see that a copy of each evaluation gets into the permanent file of each tenure track and rostered faculty member.

TO: FCQ ADMINISTRATOR

RE: INSTRUCTIONS FOR ADMINISTRATION

WHEN: SPRING 1990, ADMINISTRATION WEEK APRIL 23-27

Check to make sure that the department, course, and section numbers printed on the FCQ forms correspond to this class.

READ TO CLASS:

"Use only a NUMBER TWO PENCIL to fill in the bubbles.

Answer each question as it applies to this class or to this instructor. On the other side, please make comments about the class and instructor. These comments may be extremely useful in helping instructors to improve their teaching and courses.

Please complete the FCQ carefully because the results are used by students in selecting classes, by administrators for tenure and promotion decisions and by the faculty themselves to evaluate the effectiveness of their teaching and course materials. The forms you are about to complete will not be returned to your instructor until AFTER grades have been posted."

THEN:

(1) Pass out one questionnaire to each student.

DO NOT USE PHOTOCOPIES OR FORMS PRINTED FOR ANOTHER SECTION

(2) When everyone is finished, collect the questionnaires and place in the ORIGINAL envelope along with any unused forms.

(3) Complete the bottom of this form and put it in the envelope with the forms.

(4) Return the envelope IMMEDIATELY to your department office.

Do not return FCQ forms to the Instructor

I, _____, administered
(administrator's signature)

the FCQ on _____ for _____ in
(date) (instructor name)

_____, _____, _____.
(dept.#) (crse.#) (sect.#)

INFORMATION FOR INSTRUCTOR
IS ON THE REVERSE SIDE OF THIS FORM

TO: INSTRUCTIONAL STAFF (Faculty, GPTIs, TAs, Visiting, Honorarium)

RE: FACULTY COURSE QUESTIONNAIRE, SPRING 1990

INSTRUCTIONS FOR THE ADMINISTRATION OF THIS FCQ ARE ON THE REVERSE SIDE

Enclosed are your FCQ forms for Spring 1990.

Course evaluations are required for all courses on the Boulder campus. If used properly, these evaluations provide valuable information on teaching performance, choice of texts, and other course elements.

To eliminate the possibility of students' completing more than one form for each course, only one administration per course is permitted. Students may NOT take away forms to be returned at a later date, nor may part of the forms be administered during a subsequent class. When this occurs, the "stray" sheets are not tallied with the rest of the class.

Please follow these procedures:

1. Announce the administration date to your class, and give the FCQ envelope to the person selected to administer the questionnaires.

IF YOU TEACH MORE THAN ONE CLASS, READ THE WHITE LABEL ON THE ENVELOPE TO MAKE SURE YOU ARE DISTRIBUTING QUESTIONNAIRES TO THE RIGHT CLASS AND SECTION.

2. Make sure No. 2 pencils will be available on the administration date.

3. LEAVE THE ROOM for the duration of the course evaluation. You may NOT be present at any time during the administration. This is an extremely sensitive issue to some students; therefore, you should scrupulously adhere to the spirit and intent of this requirement. Please respect the students' rights.

4. The ADMINISTRATOR is to return all forms in the ORIGINAL ENVELOPE to NC 5012.

The instructor may not collect the forms or bring them back to the department office or to R+T. This is another sensitive area for students.

SPRING 1990

(2)

No. 91-1081

Supreme Court, U.S.
FILED
FEB 10 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

MARIE E. WIRSING,

Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF COLORADO, and each of its members, KATHLEEN ARNOLD, RICHARD BERNICK, ROBERT CALDWELL, PETER DIETZE, LYNN ELLINS, HARVEY PHELPS, NORWOOD ROBB, ROY SHORE, AND DAVID WINN; WILLIAM GRADY, DEAN OF THE SCHOOL OF EDUCATION, UNIVERSITY OF COLORADO AT DENVER; JOHN BUECHNER, CHANCELLOR OF THE UNIVERSITY OF COLORADO AT DENVER; and E. GORDON GEE, PRESIDENT OF THE UNIVERSITY OF COLORADO,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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February 10, 1992

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a University requirement, that all faculty members facilitate the distribution to students of a standardized teaching evaluation form, infringes upon faculty members' academic freedom in violation of their First Amendment rights to freedom of speech and expression.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is unpublished. It was issued on October 4, 1991 in case number 90-1215. It is reprinted in the Petition for Writ of Certiorari at appendix A1-A3.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Marie Wirsing is a professor of education at the University of Colorado at Denver. She challenges the requirement that all faculty participate, to a minimal degree, in providing standardized teaching evaluation forms to University students. She claims that the University of Colorado requirement that she participate in this teaching evaluation process violates her First Amendment rights to academic freedom and to free speech.

Dr. Wirsing believes and teaches that teaching cannot be adequately evaluated by use of any standardized evaluation form. This position forms the factual basis for her objection to participating in the University's teaching evaluation process, and for this lawsuit.

The teaching evaluation process at issue neither requires nor allows significant involvement of the faculty. Dr. Wirsing is required only to select a student proctor to provide the evaluation forms to her students, and to

remove the evaluation forms supplied to Dr. Wirsing from her campus mailbox and provide them to the student proctor. The student proctor distributes the evaluation forms to students during the last class session of the semester. The student proctor collects the completed evaluation forms and turns them in directly to the administration for compilation.

Dr. Wirsing is not in any manner prohibited by the University's policy from using her own student evaluation form in addition to the standard form. She is allowed and encouraged to express her own philosophy of teaching evaluation, both in her classroom and in all other forums. The University has not interfered with or discouraged Dr. Wirsing's criticism of the use of standardized evaluation instruments.

The United States District Court for the District of Colorado granted the University's motion for summary judgment, finding that the minimal involvement of Dr. Wirsing in the teaching evaluation process did not rise to the level of a First Amendment violation. The United States Court of Appeals for the Tenth Circuit affirmed.

SUMMARY OF THE ARGUMENT

Dr. Wirsing has failed to establish that protected expressive conduct is affected by the University teaching evaluation process and her limited involvement in this process. The District Court and Court of Appeals properly found that no First Amendment right is implicated by the facts of this case. Dr. Wirsing's ability to teach her

own philosophy and theories regarding teaching evaluation is not in any manner inhibited by the Regent's requirement. The concept of academic freedom does not allow faculty members to disregard any administrative requirement of their employment with which they philosophically disagree.

REASONS FOR DENYING THE PETITION

I. THE UNDISPUTED FACTS OF THIS CASE DO NOT SUPPORT A CLAIM OF VIOLATION OF ACADEMIC FREEDOM

The University of Colorado is a four-campus system of higher education. Its governing body is an elected Board of Directors, the Regents of the University of Colorado. The University of Colorado's Boulder campus first developed a standardized evaluation instrument in 1975 (Doc. 12, Buechner affidavit, at p. 1). It was developed at the request of the Regents by an eleven member committee consisting of six students, three faculty members, one member of the University testing service and one representative from the Office of the Chancellor (Doc. 12, at p. 1). The University faculty council appointed the three faculty members; the University student union appointed the six student members (Doc. 12 at p. 1). Beginning in 1975 and continuing throughout the University's use of this "faculty course questionnaire ("FCQ"), the FCQ's have been administered by a party other than the faculty member who is the subject of evaluation (Doc. 12 at p. 1).

After nine years of experience with a standardized FCQ at the Boulder campus, the Regents enacted a resolution that each of the four University campuses develop and use a standardized evaluation instrument (Doc. 12 at p. 1 and at appendix B). The Regents required campus development of an instrument that "meets that individual campus' specific needs, so long as such forms are uniform for that campus, include an evaluation of individual faculty, and are adaptable to either the individual campus research and testing services or such services as exist on the Boulder campus" (Doc. 12 at p. 1 and appendix B).

A University-wide committee similar in composition to the 1975 Boulder committee was appointed to oversee development and use of FCQ's (Doc. 12 at p. 1 and appendix B). The University of Colorado at Denver campus form was put into use in 1987 with specific policies prohibiting faculty involvement in the evaluation process (Doc. 11, Grady affidavit, pp. 1-3). These policies were provided to Dr. Wirsing (Doc. 11 at p. 3). Faculty members are allowed only to remove the FCQ's from their campus mailboxes, check to be certain they have the proper course numbers on them, and provide them to a student-proctor with pencils for student use in completing the forms (Doc. 11, at pp. 1-3). These instructions are written and clear. They are provided in writing to the faculty with each group of FCQ's (Doc. 11 at appendix A and appendix B. pp. 3 and 4). Faculty members may not be present while students complete the forms, nor are the faculty allowed to see the completed forms until after the FCQ results are tabulated and after all final course grades have been published (Doc. 11). This policy assures

students that their comments on the FCQ's will not affect their course grades.

Dr. Wirsing provides an evaluation form of her own design to her classes (Doc. 6, Wirsing affidavit). Most if not all of the information sought by the Wirsing form can be obtained by the Regent-approved FCQ (Doc. 6, appendices G & H to Wirsing affidavit). The FCQ asks students to rate their instructors over a five point spectrum from "very poor" to "very good" on twelve questions concerning such items as course material, exam content, workload, and accessibility of the instructor. Importantly, there is an additional choice for students answering these twelve questions. They may mark each or any question "not applicable" (Appendix G to Wirsing affidavit). If, as Dr. Wirsing contends, the twelve questions presented to the students are wholly irrelevant to her course due to her unique teaching methods, the appropriate response for students in this course is "not applicable". Two of these twelve questions (numbers eleven and twelve) ask the student to rate this course and the instructor comparatively, considering all other courses the student has taken at the University. Again, a "not applicable" option is presented to the students for these two questions (Appendix G to Wirsing affidavit).

The student evaluation form contains three additional questions which require written comments by the students rather than simple rating. These questions ask students to describe the most and least effective aspects of the course, and the best ways to improve the course. These three questions are similar to the course evaluation which Dr. Wirsing prefers and which she uses in her courses. (Appendices G & H, Wirsing affidavit). In Dr.

Wirsing's form, she asks students to write comments on "your opinions of the course itself", "your opinions about the instructor", and "specific suggestions for improving the course". The most significant difference between Dr. Wirsing's course evaluation sheet and that mandated by the Regents is that Dr. Wirsing asks that students evaluate their own participation and involvement in the work of the course. However, the Regent-mandated form provides an opportunity for such response by the students: the last item on the Regent-mandated form is allocated for "additional questions provided by your instructor or for further comments" (Appendix G, Wirsing affidavit). Dr. Wirsing is allowed and encouraged to use her own evaluation instrument in addition to that approved by the Regents (Doc. 4, Grady affidavit).

Dr. Wirsing misunderstands the role of the courts in disagreements of the nature of her dispute over teaching evaluations. Dr. Wirsing seeks to persuade the court that her view is the better one. She seeks to do so here by inappropriately including her petition for writ of certiorari references to, and excerpts from, books and articles on educational theory which are outside of the record in this case. These improper references include those listed on pages vi through viii of the petition and the discussion of these references, particularly that found in footnotes 1, 2, 3, 4, 6 and 10 and in the text on pages 23-25.

The question of the best method for teaching evaluation is not one for the courts, but is for each educational institution to determine for itself. *See Epperson v. Arkansas*, 393 U.S. 97 (1968). The lower courts' holdings that the University's teaching evaluation policy is not violative of faculty academic freedom are well-founded in fact and law.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE CONCEPT OF ACADEMIC FREEDOM DOES NOT PROHIBIT REASONABLE ADMINISTRATIVE GOVERNANCE OF THE UNIVERSITY

Dr. Wirsing's complaint is brought under the First Amendment concept of academic freedom. Her reliance on this concept is misplaced. Academic freedom has never been interpreted to mean the freedom to disregard reasonable University-mandated policies or regulations.

Academic freedom is a protection provided to both teaching institutions and teaching faculty. The "four essential freedoms" of a University are to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Academic freedom for faculty guarantees that teachers will not be asked to give up their First Amendment rights at the schoolhouse door. They retain the same First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work. *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*, 391 U.S. 563 (1968). This includes the right to publicly criticize school policies and procedures without fear of retaliatory dismissal. *Id.*

The courts have historically been most reticent to become involved in academic freedom disputes between institutions and faculty concerning course content, teaching methods, or classroom behavior. Courts have viewed

these matters as best left to the administrators and educators who have primary responsibility over academic affairs. Kaplan, *Law of Higher Education*, (1978), at 148.

The distinction between content-neutral and content-based regulation appears throughout case law deciding academic freedom issues. In general, the courts have upheld the academic freedom of the faculty member when subject to content-based regulation and have tended to hold the academic freedom rights of the University or school paramount when faculty members are governed by content-neutral regulation.

The concept of academic freedom has been addressed by the United States Supreme Court on several occasions. The Court's early academic freedom cases concern the right of faculty members to freely associate in their private lives without threatening their employment. See, for example, *Shelton v. Tucker*, 364 U.S. 479 (1960), invalidating a state statute which compelled public school and college teachers to reveal all organizational affiliations or contributions, and *Keyishian v. Board of Regents, supra*, invalidating laws requiring faculty at the State University of New York to sign a certificate stating they were not and had never been communists. In *Pickering v. Board of Education, supra*, the Court reaffirmed the right of a high school teacher to publicly criticize the spending decisions of the school board. The Court addressed the content of teaching in the classroom in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), where the Court disapproved "content-based" regulation of a lecture delivered at a state university.

This Court's most recent discussion of academic freedom is found in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990). The Court reviews the history of the academic freedom cases decided in favor of faculty members and distinguishes those cases, such as *Sweezy* and *Keyishian*, by reference to their content-based regulations as opposed to the content-neutral regulation in *University of Pennsylvania*. The Court states at 493 U.S. at 197:

> In our view, petitioner's reliance on the so-called academic freedom cases is somewhat misplaced. In those cases government was attempting to control or direct the content of the speech engaged in by the University or those affiliated with it. In *Sweezy*, for example, the court invalidated the conviction of a person found in contempt for refusing to answer questions about the content of a lecture he had delivered at a state university. Similarly, in *Keyishian*, the court invalidated a network of state laws that required public employees, including teachers at state universities, to make certifications with respect to their membership in the Communist Party. When, in those cases, the court spoke of 'academic freedom' and the right to determine on 'academic grounds' who may teach, the court was speaking in reaction to content-based regulation. See *Sweezy v. New Hampshire* . . . (citations omitted).

No United States Supreme Court case known to counsel addresses the issues of faculty refusal to comply with a reasonable regulation of the University governing teaching evaluation methods. The United States Courts of Appeals have, however, specifically addressed this issue, and have consistently held that academic freedom does

not allow the unfettered discretion of faculty to ignore or defy the reasonable regulations of the University.

In *Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419 (1st Cir. 1986), a faculty member contended that his right to academic freedom was violated when he was denied tenure because he refused to change his grading policies. The court held that even if he were fired for refusing to lower his standards, he failed to state a constitutional claim. *Id.* at 425. Finding that the First Amendment does not require that a teacher be made a sovereign to himself, the court held that the University, not the individual faculty member, had the right to set policy on course content, homework load and grading policy. *Id.* at 426. The court particularly noted that the teacher was not denied employment for voicing an opinion regarding these policies, but for refusing to comply with the policies.

In *Hetrick v. Martin*, 480 F.2d 705 (6th Cir.), *cert. denied*, 414 U.S. 1075 (1973), a nontenured professor brought a civil rights action against the University for failing to renew her contract. The grounds for nonrenewal were Dr. Hetrick's impermissible deviation from the teaching standards thought appropriate by her supervisors. The Court of Appeals holds at 707-708:

> The First Amendment guarantee of academic freedom provides a teacher with the right to encourage a vigorous exchange of ideas within the confines of the subject matter being taught, but it does not require a University or school to tolerate any manner of teaching method the teacher may choose to employ. A University has

> a right to require some conformity with whatever teaching methods are acceptable to it. In this case, it simply appears that Dr. Hetrick's teaching techniques were not acceptable to the University. The court is not in a position to weigh the merits of Dr. Hetrick's educational philosophy – it may be that her methods of teaching were and are more desirable than those embraced by the other members of the English Department – but the fact that the University decided that they were not and chose not to renew her contract does not mean that her constitutional rights to academic freedom and freedom of speech were impinged.

It is a basic premise of academic life that a professor's performance will be regularly reviewed for contract renewal until tenure is granted, for tenure, for periodic post-tenure review, and for salary adjustments. The courts have upheld a University's right to conduct such review, finding no infringement on academic freedom. In *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989), the Sixth Circuit Court of Appeals distinguishes First Amendment freedoms from proper administrative review. The court states at 830:

> It has long been recognized that the purpose of academic freedom is to preserve the "free marketplace of ideas" and protect the individual professor's classroom method from the arbitrary interference of University officials. University administrators, however, are free to observe, review or evaluate a nontenured professor's competence. See, e.g., *Hetrick*, 480 F.2d at 709. Moreover, because public education in America is committed to the control of local and state authorities, courts cannot intervene to resolve

> educational conflicts that do not "sharply implicate basic constitutional values." *Epperson*, 393 U.S. at 104, 89 S. Ct. at 270.

Most recently, in *Kirkland v. Northside Independent School District*, 890 F.2d 794 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 2620 (1990), the court refused to intervene in the non-renewal of an employment contract of a public high school teacher when the teacher claimed that the non-renewal was an attempt to censor the contents of a supplemental reading list which he used in a world history course. The court held that the teacher's conduct in disregarding the school district's administrative process for approval of reading lists was not protected speech. In holding that the district court had erred in failing to hold as a matter of law that First Amendment rights were not involved in this dispute, the court states at 800:

> Contrary to Kirkland's suggestion, this case fails to present a matter of public concern with respect to censorship of reading material or a teacher's "academic freedom". Although the concept of academic freedom has been recognized in our jurisprudence, the doctrine has never conferred upon teachers the control of public school curricula.

The case now before the Court is in accord with these decisions of the Courts of Appeals regarding the limits of academic freedom. In *Wirsing v. University of Colorado*, 793 F. Supp. 551 (D. Colo. 1990), the district court finds that Dr. Wirsing's First Amendment rights are not violated by the University's policy. The court holds at 793 F. Supp. 551, 553-54:

Here, the record is clear that Dr. Wirsing was not denied her merit salary increase because of her teaching methods, presentation of opinions contrary to those of the university, or otherwise presenting controversial ideas to her students. Rather, she was denied her merit increase for her refusal to comply with the University's teacher evaluation requirements. As one court has stated:

> Academic freedom is not a license for activity at variance with job related procedures and requirements, nor does it encompass activities which are internally destructive of the proper function of the University or disruptive of the education process.

Stastny v. Bd. of Trustees, 647 P.2d 496, 504 (Wash. App. 1982), *cert. denied*, 460 U.S. 1071 (1983). Further, although Dr. Wirsing may have a constitutionally protected right under the First Amendment to disagree with the University's policies, she has no right to evidence her disagreement by failing to perform the duty imposed upon her as a condition of employment. *Shaw v. Bd. of Trustees*, 396 F. Supp. 872, 886 (D.C. Md. 1975), aff'd, 549 F.2d 929 (4th Cir. 1976).

. . .

Moreover, the evaluation forms are not expressive of a content-based regulation. See *Sweezy v. New Hampshire*, 345 U.S. 234 (1957). Each form invites written comments and has a choice selection "not applicable" that Dr. Wirsing's students may select if the form, as Dr. Wirsing contends, is irrelevant to her course. Significantly, as the University concedes, Dr. Wirsing may use the form as an example of what not to do; she may

> criticize openly both the form and the University's evaluation form policy. Further, the evaluation forms are not distributed until the course has been completed substantially. Although the form is contrary to what Dr. Wirsing teaches, her free speech is not implicated by using the form. Accordingly, I conclude that the evaluation forms represent a University policy and procedure unrelated to course content that in no way interferes with Dr. Wirsing's academic freedom.

This case does not present a question of substance not previously addressed by this Court or a factual situation to which conflicting federal decisions would apply, and does not fall within the special circumstances required for review on writ of certiorari by Rule 10, Rules of the Supreme Court.

Dr. Wirsing assumes a broader protection for her refusal to comply with the evaluation procedure than is provided her by the concept of academic freedom. The decision of the Court of Appeals is in accord with well-established law and should not be reviewed by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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